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ABSTRACT

The higher education case law in 1988 is extensive. Cases discussed in this chapter are organized under five major topics: (1) intergovernmental relations; (2) employees, involving discrimination claims, tenured and nontenured faculty, collective bargaining, and denial of employee benefits; (3) students, involving admissions, financial aid, First Amendment rights, and academic and disciplinary dismissal; (4) liability, involving personal injury, workers' compensation, contracts, negligence, medical malpractice, and indemnification; and (5) antitrust, involving patent issues, copyright, and estates and wills. Cases that stand out as involving significant issues include a university challenge that a federal agency's award of a grant was inconsistent with the law, and the United States Supreme Court s ruling that a collective bargaining agent could not have access to an institution's campus mail service. (MLF)

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HIGHER EDUCATION

Robert M. Hendrickson
with
Dorothy E. Finnegan*

U.S. DEPARTMENT OF EDUCATION
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INTRODUCTION

The higher education case law in 1989 is extensive. Some cases stand out as involving significant issues. For example, a university challenged a federal agency's award of a grant as being inconsistent with the law. Issues of discrimination based on race in a state system of higher education were litigated in two states under title VI. The Supreme Court ruled that a collective bargaining agent could not have access to an institution's campus mail service. Student issues included a case involving gay rights and a case involving freedom of religion, while a city antidiscrimination statute also was before the courts. Cases finding that alcoholism was not a handicap under federal law and the question of child support for college tuition round out the diversity of cases in this chapter.

INTERGOVERNMENTAL RELATIONS

The lead off case for this section concerns a conflict of interest question involving a board member. A federal district court judge served on the board of trustees of a private Louisiana university. In a case involving the possession of the title to property owned by the private university, the judge issued a ruling instead of disqualifying himself. The Supreme Court upheld a court of appeals decision[1] that even the appearance of impropriety should be sufficient to result in the judge, as board member, to disqualify himself.[2]

In a Georgia case, the court found that private colleges were non-profit corporations, not charitable trusts.[3] At issue was the question of whether a private college board, after merging with another private college, could close one of the colleges. The court ruled that since they were private corporations they had the power to both merge and close one of the colleges.

Legislation limiting the board of trustees' investment in companies doing business in South Africa was challenged in Michigan.[4] The court ruled that the board held statutory autonomy to decide how to invest its funds and that the statute violated the state constitution.

In Illinois, a board member sued to enjoin the college from supporting and funding a campaign to increase the tax revenues received by the college.[5] While the record shows that the college allowed the committee supporting the tax increase to use its facilities, there is no evidence to indicate that the college provided funds to the committee. The court found that the plaintiff lacked standing and should have taken her complaint to the board of trustees. In Texas, a court ruled that a university auxiliary organization could not bring suit against the institution without the authorization of the board of regents.[6]

In Missouri, the court declared an election of board members void and called for a reelection because ballots in one district did not contain the slate of candidates for the junior college board.[7] However, the court ruled that one candidate would not be disqualified because he did not vote in a specific precinct within the district. The court interpreted the law to require that the person simply had voted in the district prior to running for a board position and reversed the lower court decision disqualifying the candidate.

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1. Liljeberg v. Health Serv. Acquisition Corp., 796 F.2d 796 (5th Cir. 1986).
2. Liljeberg v. Health Serv. Acquisition Corp., 108 S. Ct. 2194 (1988).
3. Corporation of Mercer Univ. v. Smith, 371 S.E.2d 858 (Ga. 1988).
4. Regents of Univ. of Mich. v. State, 419 N.W.2d 773 (Mich. Ct. App. 1988).
5. Jenner v. Wissore, 517 N.E.2d 1220 (Ill. App. Ct. 1988).
6. Gulf Regional Educ. Television Affiliates v. University of Houston, 746 S.W.2d 803 (Tex. Ct. App. 1988).
7. Eversole v. Wood, 754 S.W.2d 27 (Mo. Ct. App. 1988).

In a question over legislative authority, an Alabama court nullified a section of an appropriations bill authorizing a degree program at a specific community college.[8] The court found that the state constitution requires that legislation be limited to one subject, and the approval of a degree program was outside the subject matter of an appropriations bill. Furthermore, the court found that the approval of the degree program was never reviewed by the Alabama Commission on Higher Education as required by law.

The question of a governmental agency's authority to regulate funds allocated for research was before the federal courts. An Ohio university challenged the award of a national center by the Secretary of the Department of Education where the consortium of institutions receiving the award did not meet the requirements under the law.[9] The court found that the federal statute required a single director and single location for the national center. These were matters to be considered at the time of the award and could not be negotiated by the Secretary of Education after the award. In a related case, the Eleventh Circuit Court of Appeals found that the Secretary of Education could require a college to repay a grant awarded under the Aid to Developing Institutions Act[10] where evidence indicated that the institution failed to provide adequate documentation of salary and fringe benefits costs.[11]

In another case, the court found that a private right of action and injunctive relief were available where a violation of the Hill-Burton Act[12] existed.[13] The court found that an Iowa hospital illegally counted patients aided under state-aid programs when filing for credit for the care of indigent patients under the Hill-Burton Act. In New York, the court ruled that a university hospital cardiac care unit did not qualify under medicare as a special care unit.[14]

In a case involving the award of a license to a proprietary institution, the court found that the institution must exhaust administrative remedies with the state licensing agency before utilizing court proceedings.[15] In a Maine accreditation case, a private accrediting agency could not be prevented from removing accreditation after the private college filed

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8. Wallace State Community College v. Alabama Comm'n on Higher Educ., 527 So. 2d 1310 (Ala. Civ. App. 1988).

9. Board of Trustees of Ohio State Univ. v. United States Dep't of Educ., 681 F. Supp. 460 (S.D. Ohio 1988).

10. Title III of The Higher Education Act of 1965, 20 U.S.C. §§ 1051 *et seq.* (1978).

11. Fort Valley State College v. Bennett, 853 F.2d 862 (Ga. Ct. App. 1988).

12. Public Health Servs. Act, 42 U.S.C. § 291 *et seq.* (1978).

13. Lile v. University of Iowa Hosp. and Clinics, 674 F. Supp. 288 (S.D. Iowa 1987).

14. University Hosp. N.Y. Univ. v. Bowen, 684 F. Supp. 1234 (S.D.N.Y. 1988).

15. New Trends Beauty School v. Indiana Bd. of Beauty Culture Examiners, 518 N.E.2d 1101 (Ind. Ct. App. 1988).

for bankruptcy.[16] The court found that accreditation was not property, nor was a private accrediting agency a governmental unit under the Bankruptcy Code. A Florida court found that a state agency had the legislative authority to require a correspondence school to set standards for a specific tuition refund policy.[17] Finally, an agency on ethical standards found that an attorney was involved in conflict of interest by representing a client in a suit against a university where he held an appointment as a full-time professor.[18]

Cases involving state sunshine laws were again before the courts. In one case, Northwestern University, a private institution, entered into an agreement with the city of Evanston to cosponsor the redevelopment of a downtown area through the establishment of a research park.[19] Two private for profit corporations were formed and the city, through public meetings, decided to provide public subsidies to invest in these corporations. At issue before the court was whether receipt of public subsidies by a private corporation brought it under the opened meeting and freedom of information laws mandating public access to minutes of board of directors meetings. The court ruled that the investment by the city did not make these private corporations "subsidiary bodies" of the city subject to the sunshine laws. A New Jersey court ruled that a state association of public college governing boards was subject to open meeting laws where the association received public funds from the member boards.[20] A West Virginia court found a symbiotic relationship between the state and a university hospital subjecting it to sunshine laws.[21]

In Wisconsin, a court refused to publicize the grades and attendance records of students as requested by a faculty member under prosecution in a criminal case.[22] The court found that the Family Rights and Privacy Act[23] mandated the privacy of individual student records. In South Carolina, a newspaper sought the disclosure of information on a board vote which took place sixty days prior to this suit.[24] The court found the lapse of time exceeded the sunshine law statute of limitations. However,

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16. Nasson College v. New England Ass'n of Schools and Colleges, Inc., 80 Bankr. 600 (Bankr. D. Me. 1988).
17. Associated Schools, Inc. v. Department of Educ., 522 So. 2d 426 (Fla. Dist. Ct. App. 1988).
18. *In re* Executive Comm'n on Ethical Standards, 537 A.2d 713 (N.J. Super. Ct. App. Div. 1988).
19. Hopf v. Topcorp, Inc., 527 N.E.2d 1 (Ill. App. Ct. 1988).
20. Council of N.J. State College Locals v. New Jersey State College Governing Bd., 545 A.2d 204 (N.J. Super. Ct. App. Div. 1988).
21. Queen v. West Virginia Univ. Hosps., 365 S.E.2d 375 (W. Va. 1987).
22. Rathie v. Northeastern Wis. Tech. Inst., 419 N.W.2d 296 (Wis. Ct. App. 1987).
23. Family Rights and Privacy Act, 20 U.S.C. § 1232g (1978).
24. Knight Publishing Co. v. University of S.C., 367 S.E.2d 20 (S.C. 1988).

when a public university's president failed to seek an opinion from the state attorney general on whether requested records on recruited athletes were exempt from the sunshine provisions under the current law, the records were assumed to be public.[25] The court also ruled that one of the records sought was for a person who was never a student, a category exempted under the statute.

Cases involving tax exemptions were also litigated. In Indiana, the state tax commission refused a tax exemption request by a private foundation which owned 31% of the interest in a student housing facility for which it had sole management.[26] The court found that the state legislature had authority to define tax exempt status based on ownership and not exclusively on use as alleged by the plaintiffs in this case. In New York, a court found that a faculty-student association should have filed an application for certification as a nonprofit, tax exempt organization, rather than seeking a declaratory judgment changing an assessor's determination of taxes owed on a parcel of land.[27] An Illinois court ruled that a fraternity house was exempt from tax because its primary use, the housing of students, was a legitimate educational purpose under the law.[28] In another case, a Georgia court found that a trade school chartered by a union where students are employed while learning a trade was not a "seminary of learning" exempt from tax.[29] The court found that the primary purpose of the school was to provide apprentices to building contractors. Finally, a state court found that McDonald's had entered into a lease arrangement rather than a license agreement and was subject to tax even though the college held tax exempt status.[30] The agreement was a lease where the institution clearly relinquished control of the area where the food service was to operate.

City zoning provisions were challenged in several states. In New Jersey, a court found that a city ordinance allowing single-family living units in residential areas was valid.[31] However, the court found that ten students living in a single-family dwelling constituted a single-family unit as defined by the law since they shared cooking, cleaning, and financial responsibilities for the dwelling. In another case, a foundation was denied a permit to use a building for educational purposes without receipt of a charter from the State Board of Regents designating it as an

25. Vandiver v. Star-Telegram, Inc., 756 S.W.2d 103 (Tex. Ct. App. 1988).
26. Indiana Univ. Found. v. State Bd. of Tax Comm'r, 527 N.E.2d 1166 (Ind. Tax Ct. 1988).
27. Faculty-Student Ass'n of State Univ. College at Buffalo, Inc. v. Town of Lyndon, 523 N.Y.S.2d 943 (Sup. Ct. 1987).
28. Knox College v. Illinois Dep't of Revenue, 523 N.E.2d 1312 (Ill. App. Ct. 1988).
29. Roberts v. J.A.T.T. Title Holding Corp., 366 S.E.2d 297 (Ga. Ct. App. 1988).
30. Stevens v. Rosewell, 523 N.E.2d 1098 (Ill. App. Ct. 1988).
31. Borough of Glassboro v. Vallorosi, 535 A.2d 544 (N.J. Super. Ct. Ch. Div. 1987).

educational organization.[32] In Pennsylvania, the court granted variance in zoning laws to build a parking lot located on land in a flood plain,[33] but a Massachusetts' court refused a university's variance request because it would harm a landowner whose property abutted the property in question.[34] In another case, a court found the proposed use of a newly acquired building violated the land use provisions in the deed, and a state agency had no authority to override them.[35]

Finally, a gas company installing a pipeline for a public university had the right to execute the power of eminent domain.[36] On reconsideration, the court affirmed this decision.[37]

In a Virginia zoning case, a law school charged the city with the taking of private property without due process when it refused to grant a variance on a parcel of land zoned residential.[38] The case was dismissed for failure to seek a remedy in state court. In a related issue, a court ruled that ownership was defined by the river bank where alluvian deposits resulted in the development of a bulkhead point in the river.[39]

A number of cases involve questions of the jurisdiction of the court or the police over a matter involving a higher education institution. In one case, the court found that a fraternity could be charged with disorderly conduct under the state criminal code for excessive noise, even though they could have been prosecuted under the lesser city noise ordinance.[40] In a case involving the rape of a college student, the student was denied a change of venue to the county where she resided.[41] The court found that recruitment, alumni solicitation, and fund raising by the college did not constitute the conduct of business in the county as defined by the law. In an unusual case, two security patrolmen caught removing money from a university safe where charged with illegal entry and could not claim they had a license or privilege to enter any building on campus because they were issued a master key.[42]

University hospitals were also involved in litigation. In one case, eleventh amendment immunity blocked a suit against a hospital by the deceased indegent's estate because he was denied service at a hospital

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32. Yeshiva & Mesivta Toras Chaim v. Rose, 523 N.Y.S.2d 907 (App. Div. 1988).
33. Snyder v. York City Zoning Hearing Bd., 539 A.2d 915 (Pa. Commw. Ct. 1988).
34. Bedford v. Trustees of Boston Univ., 518 N.E.2d 874 (Mass. App. Ct. 1988).
35. City of Harrisburg v. Capitol Hous. Corp., 543 A.2d 620 (Pa. Commw. Ct. 1988).
36. Vernocy v. T.W. Phillips Gas and Oil Co., 540 A.2d 1012 (Pa. Commw. Ct. 1988).
37. Vernocy v. T.W. Phillips Gas and Oil Co., 545 A.2d 969 (Pa. Commw. Ct. 1988).
38. Northern Va. School of Law v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).
39. Pittman v. Administrators of Tulane Educ. Fund, 521 So. 2d 690 (La. Ct. App. 1988).
40. Commonwealth v. Alpha Epsilon Pi, 540 A.2d 580 (Pa. Super. Ct. 1988).
41. Grier v. Bauman, 419 N.W.2d 53 (Mich. Ct. App. 1988).
42. People v. Powers, 525 N.Y.S.2d 727 (App. Div. 1988).

emergency room.[43] Competitor hospitals failed in their attempt to prevent the expansion of the university hospital through a petition to the court to force the withdrawal of the certificate of need issued by the health facilities planning board.[44] In an Alabama case, a university hospital was granted an exemption from the certificate of need requirement because the equipment sought would be used for research.[45]

EMPLOYEES

Litigation in this area continues to be heavy. Sex and race discrimination dominate in terms of numbers of cases. The new civil rights law will impact these cases in the future.

Discrimination in Employment

Title VI. Cases under title VI, along with cases discussed in the subsequent section on title IX (and other federal antidiscrimination laws with program specific provisions), have been affected by the passage of the Civil Rights Restoration Act of 1988.[46] The Restoration Act applies the provisions of several antidiscrimination laws to the total organization or system, rather than limiting it to the specific program receiving federal funds as per the Supreme Court's interpretation of title IX in *Grove City College v. Bell.*[47]

The Restoration Act looms large in several cases charging discrimination in the maintenance of a dual system of higher education within state. In Louisiana, the court rejected the argument that *Bazemore v. Friday*[48] applies to cases involving the state system of higher education.[49] The federal district court, citing a Sixth Circuit Court decision,[50] found that state policies and practices which were racially neutral, allowing for student free choice of which higher education institution to attend but resulting in the maintenance of racially distinguishable institutions within the state, were not enough to bring the state system within compliance with

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43. Estate of Ritter v. University of Mich., 851 F.2d 846 (6th Cir. 1988).

44. Condell Hosp. v. Health Facilities Planning Bd., 515 N.E.2d 750 (Ill. App. Ct. 1987).

45. University of Ala. Hosp. v. Alabama Renal Stone Inst., Inc., 518 So. 2d 721 (Ala. Civ. App. 1987).

46. The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a.

47. *See* The Yearbook of School Law 1985 at 312; Grove City College v. Bell, 104 S. Ct. 1211 (1984).

48. *See* The Yearbook of School Law 1987 at 240; Bazemore v. Friday, 106 S. Ct. 3000 (1986).

49. United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988).

50. *See* The Yearbook of School Law 1987 at 238, Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986).

title VI. This decision was based on the fact that the percentage of black enrollment in predominantly white institutions had decreased and that white enrollment in predominantly black institutions had increased only slightly. This court also ruled that the United States had standing to bring a charge under title VI against a state, and that the Congress had not exceeded its authority in nullifying the Court decision in *Grove City* by passing the Restoration Act.

However, in Mississippi, the court reached a different finding.[51] Relying on *Bazemore*, the court conducted an extensive analysis of all aspects of the higher education policy and practices in the state of Mississippi. In a review of the history of the state institutions' admission and recruitment policies, faculty recruitment, assessment and development of institutional missions, program distribution and reduction, competition among educational centers, quality of instruction and research, equity in funding, and adequacy of facilities, the court found that the state has made a good faith effort to disassemble the state's duel system of higher education. The state's policies were found to be racially neutral, and the state was proven to have acted affirmatively to reduce the predominance of enrollment of one race at all of its institutions.

In an Alabama case, the court ruled on whether a technical college had achieved the status of a racially desegregated institution removing it from further court supervision. The school has operated under court supervision and various court orders commencing with a 1967 decision.[52] The district court found that having achieved such status the court supervision should be nullified. In a related case, a district court judge excused himself from presiding over any future discrimination cases involving the state system of higher education, while expressing disagreement in his opinion with this court ordered action.[53] The Eleventh Circuit Court had found that the judge's involvement as a state senator in higher education legislation, and his involvement as a lawyer in some of the desegregation cases, would bias his ability to make an equitable decision in these matters.[54]

Title VII. Procedural issues surround several title VII cases. In a Wyoming case involving a title VII charge of sexual harassment, the court found that it was not bound by the findings of a college grievance committee.[55] Furthermore, the court had not errored in allowing the former husband, whose testimony was damaging to the plaintiff, to testify when his name was not on the pretrial witness list. The court

51. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).
52. Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967).
53. Lee v. Macon County Bd. of Educ., 681 F. Supp. 730 (N.D. Ala. 1988).
54. Lee v. Macon County Bd. of Educ., 692 F. Supp. 1277; *see also* The Yearbook of Education Law 1988 at 229, United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987).
55. Long v. Laramie County Community College Dist., 840 F.2d 743 (10th Cir. 1988).

found issues existed to mandate trial on the plaintiff's civil rights claims against her supervisors. The Fourth Circuit court, reversing a district court, found that a plaintiff could sustain a charge against the board even though he only named the community college in the original administrative proceedings.[56] The Second Circuit Court upheld a lower court dismissal of a civil rights claim which involved title VII because of failure to state a redressable claim and comply with discovery orders.[57] However, another court refused to grant a summary judgment where the plaintiff alleged discrimination resulting from pregnancy.[58]

A number of cases involved the shifting burden of proof requirements in title VII cases. For example, the establishment of a *prima facia* case of discrimination was before the Eleventh Circuit Court in a case alleging sex discrimination in promotion.[59] The court found that the plaintiff failed to show she was qualified for promotion. Also, the plaintiff failed to show that an equally or less qualified male had been promoted. The court found that while a comparable male was also rejected for promotion, his credentials were stronger on publications than the plaintiff's. In a case involving a private university, the court refused to grant a summary judgment to give the plaintiff a chance to substantiate a claim that the reasons for dismissal of a guard were pretextual.[60] In a New York case, a hospital was granted a summary judgment in the termination of a hospital director who had complained about the hiring of a white female for another position.[61] The court found the institution had other legitimate reasons for the termination.

A full professor at a private Catholic university brought a claim of discrimination based on religious affiliation in the award of salaries and other employment benefits.[62] Using a statistical analysis, he attempted to show that non-Catholic faculty received a lower percentage increase in salary than did Catholics. Additionally, he claimed that Jesuit priests received lodging and food while other faculty were not offered these benefits. The court found that he failed to establish a *prima facia* case of discrimination and any statistical differences were removed when actual dollars instead of percentages of increases were substituted in the analysis. Furthermore, since Jesuit priests return all of their salary to the institution, providing them with the aforestated benefits was not found to be discriminatory.

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56. Alvarado v. Board of Trustees of Montgomery Community College, 848 F.2d 457 (4th Cir. 1988).
57. Sere v. Trustees of Univ. of Ill., 852 F.2d 285 (7th Cir. 1988).
58. Suarez v. Illinois Valley Community College, 688 F. Supp. 376 (N.D. Ill. 1988).
59. Wu v. Thomas, 847 F.2d 1480 (11th Cir. 1988).
60. Gomez v. Trustees of Harvard Univ., 677 F. Supp. 23 (D.D.C. 1988).
61. Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590 (2d Cir. 1988).
62. Tagatz v. Marquette Univ., 681 F. Supp. 1344 (E.D. Wis. 1988).

In a case on remand, a district court found that a university's decision to reopen a search and not hire the female who was the third candidate on the hiring list, was not a decision based on sex discrimination.[63] This case originated from a discrimination in hiring charge resulting from the decision of the sociology department committee that the female candidate did not meet the qualifications to fill an endowed chair shared by both the economics and sociology departments.[64]

Several class action cases were before the court. One involved an institution which was under a court order from a previous class action case.[65] The court found that the decision not to move a softball coach from a half-time to full-time position was a programmatic or budgetary decision, not a personnel decision covered by the court order.

Another case involving a class of university extension agents was an appeal of a district court decision on remand from the Supreme Court.[66] The Fourth Circuit Court remanded the case with instructions that, consistent with the Supreme Court findings, failure to eliminate salary discrimination emanating from pre-title VII discriminatory practices was a violation of the law.[67] Furthermore, the court found that a class of black extension agents should be certified to bring charges of discrimination in promotion decisions.

Another class action case has seen extensive action in the courts. The original case involved discrimination charges brought by the female faculty of a medical college. The district court found that the female faculty had failed to establish a *prima facia* case of disparate treatment and barred the disparate impact case because they failed to raise the claim.[68] On appeal, the case was remanded in light of the Supreme Court's ruling on multiple regression analysis admission of evidence in *Bazemore*.[69] On remand, the district court again dismissed the case, relying on the procedural bar of the disparate impact claim.[70] The circuit court, on appeal, has remanded the case to another district court, finding that while the words disparate impact were not used until midtrial, the basic thrust of the claim was

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63. Lamphere v. Brown Univ., 690 F. Supp. 125 (D.R.I. 1988); *see* The Yearbook of School Law 1987 at 242, Lamphere v. Brown Univ., 798 F.2d 532 (1st Cir. 1986).

64. Lamphere v. Brown Univ., 613 F. Supp. 971 (D.R.I. 1988); *see also* The Yearbook of School Law 1983 at 296, Lamphere v. Brown Univ., 685 F.2d 743 (1st Cir. 1982).

65. Semnewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988); *see* The Yearbook of School Law 1985 at 311, Rajender v. University of Minn., 730 F.2d 1110 (8th Cir. 1983).

66. *See* The Yearbook of School Law 1986 at 233, Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984), rev'd, 106 S. Ct. 3000 (1986); *see* The Yearbook of School Law 1987 at 240.

67. Bazemore v. Friday, 848 F.2d 476 (4th Cir. 1988).

68. *See* The Yearbook of School Law 1984 at 284, 289, Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983).

69. *See supra* note 66.

70. *See* The Yearbook of Education Law 1988 at 233, Sobel v. Yeshiva Univ., 656 F. Supp. 587 (S.D.N.Y. 1987).

clearly a disparate impact claim which should not be procedurally barred.[71] Furthermore, the court found that plaintiffs have presented substantial claims of continued discrimination emanating from pre-title VII salary decisions.

A district court case involving a class of females in a New York public institution yielded a finding of no sex discrimination against the class.[72] The court noted in deciding this disparate impact and disparate treatment case, that evidence of intentional discrimination in individual claims is relevant to class claims of disparate treatment, while evidence of classwide discrimination may show that the reasons in individual claims may be pretextual.[73] After an extensive analysis of all of the statistical evidence and their weaknesses, the court decided to use the statistical evidence but rely on anecdotal evidence to determine if the class was discriminated against due to sex. The court found no discrimination based on sex in any of the individual title VII claims and in only one of the equal pay claims. Thus, the finding was in favor of the institution on the class sex discrimination claim.

In a claim involving retaliation, the court found that the individual was not discriminated against either in the award of salary or retaliation through termination.[74] The court also found that the comparable male salary was actually slightly lower than the plaintiff's at the time of hiring and that the termination occurred prior to the institution's knowledge that she had filed charges with E.E.O.C.

In a damage settlement, the court found that the lower court had errored in viewing a secretarial position as comparable to a public relations job at a community college where termination was based on impermissible sex discrimination.[75] Additionally, the court found that interest should have been awarded on back pay.

Equal Pay Act. In a case alleging sex discrimination in employment practices and salary, the salary discrimination charge went to trial while the other issues resulted in a summary judgment for the institution.[76] The court found that the salary disparity was based on a merit system in which the plaintiff's refusal to teach certain courses became a valid factor. The teaching load issue was part of the controversy over the plaintiff's contract. The court found the terms of the contract were clearly spelled out in a letter which referred to the faculty handbook on teaching load. Discussions between the department chair and the plaintiff

71. Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir. 1988).
72. Ottaviani v. State Univ. of N.Y. at New Paltz, 679 F. Supp. 288 (S.D.N.Y. 1988).
73. *Id.* at 298.
74. Seligson v. Massachusetts Inst. of Technology, 677 F. Supp. 648 (D. Mass. 1987).
75. Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988).
76. Willner v. University of Kan., 848 F.2d 1020 (10th Cir. 1988).

were never made part of the contract. Two other cases involving the sister of the plaintiff, another university professor who brought charges of sex discrimination, failed to establish a *prima facia* case resulting in rulings in favor of the university.[77]

Title IX. In a title IX case involving admission to five different medical schools where the Supreme Court[78] established a private right of action in title IX cases, the plaintiff found herself in court appealing a contempt order.[79] By filing an action in state court, a federal court issued a contempt citation based on previous litigation, a fine of $100 for each day in violation, and an order to prohibit her husband from representing her in subsequent actions. The court subsequently denied the bulk of a motion to amend the contempt order except as to the date the fine should begin accrual.[80]

As discussed under title VI, the Civil Rights Restoration Act of 1988 also expands the coverage of title IX from a specific program receiving federal financial assistance to the total institution or state system. In a title IX and equal protection claim under the fourteenth amendment, the court refused to grant the university a summary judgment.[81] The court found that material issues of fact existed requiring adjudication of the plaintiff's allegation of discrimination based on gender in participation in athletic programs, the award of athletic scholarships, the allocation of funds, the assignment of coaching staff, the allocation of funds for travel and accommodations, and the allocation of trainers, training services, dining services, housing, and publicity.

Age Discrimination. The lead off case in this section involves a Supreme Court decision.[82] The case, filed by a former employee of a university, brought a claim of age discrimination along with a number of state claims to the federal district court. After six months of fact finding, the petitioner asked that the federal age discrimination claim be withdrawn and the district court remanded the case to state court. The Supreme Court, on *certiorari*, ruled that the district court has the discretion to remand a case to a state court when pendent state claims remain after the withdrawal of all federal claims.

In a question of jurisdiction, a Catholic college alleged that the first

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77. Willner v. University of Kan., 848 F.2d 1023 (10th Cir. 1988); Willner v. University of Kan., 848 F.2d 1032 (10th Cir. 1988).

78. *See* The Yearbook of School Law 1980 at 119, Cannon v. University of Chicago, 441 U.S. 677 (1979).

79. Cannon v. Loyola Univ. of Chicago, 676 F. Supp. 823 (N.D. Ill. 1987); *see* The Yearbook of Education Law 1988 at 234, Cannon v. Loyola Univ. of Chicago, 116 F.R.D. 244 (N.D. Ill. 1987).

80. Cannon v. Loyola Univ. of Chicago, 687 F. Supp. 424 (N.D. Ill. 1988).

81. Haffer v. Temple Univ., 678 F. Supp. 517 (E.D. Pa. 1987); *see* The Yearbook of Education Law 1988 at 232, Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987).

82. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988).

amendment establishment and free exercise clauses prohibited the enforcement of the Age Discrimination in Employment Act[83] at religious affiliated institutions.[84] The court found that the relatively narrow focus of the ADEA does not entangle government in the affairs of religious institutions so as to implicate the first amendment religion clauses.

Other ADEA cases dealt with specific charges of discriminatory practices. In a New York case, the court found that the plaintiff had been notified of the discontinuation of the employer's contribution to the employee's pension plan after he reached the age of 65, even though he continued employment until 70.[85] The court also found that this practice did not violate the Employee Retirement Income Security Act of 1974.[86] In a California case involving hiring, the court found that the plaintiff failed to establish a *prima facia* case of age discrimination in two separate hirings under disparate treatment theory.[87] In one case, the plaintiff's failure to submit letters of recommendation meant he had failed to complete the application process and, therefore, could not sustain a claim. In the other instance, the court found that a member of the protected class was hired over the plaintiff and plaintiff's qualification were clearly inferior. In a Washington case involving violation of a state age discrimination law, the court found that the plaintiff had failed to establish that the defendant's reasons for termination were a pretext for age discrimination.[88]

However, several cases had different results. An Illinois case took a unique twist in that it involved not the claims surrounding the choice of early retirement, but rather alleged that those who chose to work until the mandatory retirement age were penalized by the way benefit packages were awarded, thus becoming a "subterfuge" in violation of ADEA. The court agreed and denied defendant's motion for summary judgment. A New York court found that a professor who had entered into a settlement agreement whereby full-time employment would be terminated and she would release the college from all liability, did not preclude a suit where the college refused part-time employment because of a policy of not employing anyone over the age of seventy.[90] In Arkansas, the court found that evidence was sufficient to support the jury finding of age discrimination and that interest on back-pay was appropriate as part of the damage award.[91]

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83. Age Discrimination Employment Act of 1967, 29 U.S.C. §§ et seq. (1978).
84. Soriano v. Xavier Univ., 687 F. Supp. 1188 (S.D. Ohio 1988).
85. Kadane v. Hofstra Univ., 682 F. Supp. 166 (E.D.N.Y. 1988).
86. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1022(b), 1024(b)(1) (1976).
87. Levy v. Regents of the Univ. of Cal., 245 Cal. Rptr. 576 (Ct. App. 1988).
88. Grimwood v. University of Puget Sound, 753 P.2d 517 (Wash. 1988).
89. Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988).
90. Jochnowitz v. Russell Sage College, 523 N.Y.S.2d 656 (App. Div. 1988).
91. Price v. Arkansas College, 683 F. Supp. 712 (E.D. Ark. 1988).

Rehabilitation Act of 1973. Discrimination due to a handicap was before the court because of the termination of a blind employee of the Department of Education.[92] Affirming the district court opinion, the court found no error in the finding that efforts had been made to provide the blind employee with aids such as readers to perform his tasks. The court also found that the department had reduced the work load as another means to accommodate the handicap. While the court questioned why a blind person would be assigned a job requiring heavy research and reading, they found that accommodations were sufficient to hold that termination based on poor performance was not discriminatory.

Hiring Discrimination. An Illinois court found that the university security department's failure to hire a black applicant because he had a misdemeanor arrest for carrying a gun was discrimination.[93] The court found that the institution failed in its burden to support the allegation that refusal to hire because of the arrest record was a business necessity. The Fifth Circuit Court affirmed the decision that a black police officer was not discriminated against or denied a position as an associate vice-president of administration because of his race or protected speech.[94]

Nontenured Faculty

First Amendment Speech. The question of whether a librarian was discharged because of protected speech was before the court in a Virginia case.[95] The plaintiff alleged that the filing of a grievance at the institution and his testimony before the Virginia General Assembly about misappropriation of state funds were the basis for his removal. The court found that the grievance about his employment status where his contract had been reduced from three years to one year prior to his testimony before the legislature was not a public concern implicating protected speech under the amendment. Furthermore, the court found that the plaintiff failed to establish a causal link between his protected speech, testimony before the general assembly, and his removal. This finding is further buttressed by the timing of the majority of the disciplinary actions taken against the employee prior to his testimony.

Nonrenewal Procedures. The issues of the nonrenewal of a tenure track faculty member or the denial of tenure were vigorously litigated in the past year. The issues include questions of contractual rights in either nonrenewal or tenure denial, constitutional issues emanating from the

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92. Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988).
93. Board of Trustees of S. Ill. Univ. v. Knight, 516 N.E.2d 991 (Ill. Ct. App. 1987).
94. Ferguson v. Hill, 846 F.2d 20 (5th Cir. 1988).
95. Leachman v. Rectors and Visitors of Univ. of Va., 691 F. Supp. 961 (W.D. Va. 1988).

denial or nonrenewal action, access to materials or deliberations in the tenure review process, and liability issues.

In the nonrenewal of a probationary faculty member, one issue is the authority to make such decisions. In an Illinois case, the court found that the statutory authority of the board to dismiss nontenured faculty was a nondelegated power which could not be superceded by a collective bargaining agreement.[96] Another issue is the contractual obligations possessed by the institution. A District of Columbia court ruled that the plaintiff had shown a reasonable expectation of re-employment under a three-year tenure track contract when the institution failed to meet its own deadline for notification of nonrenewal.[97] In another case, the First Circuit Court affirmed a lower court decision that the institution, after acquiring a college, was not obligated to honor the notification provisions of the previous institution and notification was timely as found by a jury trial.[98]

Questions of contractual obligations were before a New York court which found that a faculty member's contract was not breached when his contract was not renewed.[99] A Louisiana court found that an unsubstantiated verbal promise of tenure would not supercede a contract where no guarantee of the award of tenure was implied or expressed.[100] A court ruled that an institution could rescind a contract without a hearing when it found out that the faculty member had held concurrent full-time positions at two universities.[101] In Georgia, a court found that a contract was not breached in the denial of tenure nor could the denial of access to data after the denial decision result in a damage award.[102] The Fifth Circuit Court found that the letter sent as a written response to annual evaluation was too far removed to be a pretermination notice the next year.[103] Also, the court found that plaintiff's speech did not involve matters of public concern and thus did not fall within the protection of the first amendment.

The procedures in the review and denial of tenure were also before the courts. In an unusual case, a faculty member applied for and was reviewed for both promotion to assistant professor and tenure but was denied both.[104] The form sent to award her a terminal year contract

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96. Board of Trustees of Community College Dist. No. 508 v. Cook County College Teachers Union, 522 N.E.2d 93 (Ill. App. Ct. 1987).

97. Howard Univ. v. Best, 547 A.2d 144 (D.C. 1988).

98. Aggarwal v. Ponce School of Medicine, 837 F.2d 17 (1st Cir. 1988).

99. Rosen v. Vassar College, 525 N.Y.S.2d 399 (App. Div. 1988).

100. Gottlieb v. Tulane Univ. of La., 529 So. 2d 128 (La. Ct. App. 1988); *see* The Yearbook of Education Law 1988 at 239, Gottlieb v. Tulane Univ. of La., 809 F.2d 278 (5th Cir. 1987).

101. Morgan v. American Univ., 534 A.2d 323 (D.C. 1987).

102. Moffie v. Oglethorpe Univ., Inc., 367 S.E.2d 112 (Ga. Ct. App. 1988).

103. Page v. DeLaune, 837 F.2d 233 (5th Cir. 1988).

104. House v. University of Cent. Ark., 684 F. Supp. 222 (E.D. Ark. 1988).

contained a check after the words "tenure-track contract" instead of "terminal contract." The plaintiff alleged that this error gave her defacto tenure. The board of trustees met several times over this matter and eventually changed its vote and denied tenure. The court ruled that the handbook was clear that this was a terminal contract and plaintiff acknowledged that she knew the misplaced "X" was an error. Furthermore, the court ruled that statements made to the press involving public meetings of the board did not implicate a liberty interest requiring due process. In a New York case, the court ruled that the chancellor's failure to forward several faculty member's tenure review materials to the board was error.[105] Clearly, state law gives the board the power to grant tenure and does not vest any discretion beyond making a recommendation to the chancellor.

Several cases involved allegations of the existence of a property right or a liberty interest requiring due process in the denial of tenure. The Fifth Circuit Court found that the faculty member had no property interest or liberty interest requiring due process in the denial of tenure and that the institution provided valid reasons other than the faculty member's public statements about the schools policy of disposal of laboratory animals.[106] In a South Dakota case, a federal court reached similar conclusions of the due process issue but found that sufficient facts remained unresolved to require the first amendment claim to be tried.[107]

Access to materials and deliberations were also before the court. In two Pennsylvania cases, one involving a "state related" institution[108] and another involving a private institution,[109] the court found that materials prepared by the various levels of peer review within the institution's tenure review process are performance evaluations, not letters of reference, and should be subject to employee inspection under the state labor laws.[110] In Minnesota, a federal court granted a faculty member the right to review the tenure and personnel files of all faculty members of the college in a case alleging sex discrimination under title VII.[111] The Third Circuit Court refused to dismiss an order by the district court to give access to peer

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105. Faculty of City Univ. of N.Y. School at Queens College v. Murphy, 531 N.Y.S.2d 665 (Sup. Ct. 1988).

106. Staheli v. University of Miss., 854 F.2d 121 (5th Cir. 1988); *see* The Yearbook of School Law 1986 at 247, Staheli v. University of Miss., 621 F. Supp. 449 (D. Miss. 1985).

107. Beville v. South Dakota Bd. of Regents, 687 F. Supp. 464 (D.S.D. 1988), *see also* Beville v. University of S.D., 420 N.W.2d 9 (S.D. 1988).

108. Pennsylvania State Univ. v. Commonwealth, Dep't of Labor and Indus., 536 A.2d 852 (Pa. Commw. Ct. 1988).

109. Lafayette College v. Commonwealth, Dep't of Labor & Indus., 546 A.2d 126 (Pa. Commw. Ct. 1988).

110. Personnel Files Act, 43 Pa. Con. Stat. Ann. §§ 1321, 1322 (1978).

111. Orbovich v. Macalester College, 119 F.R.D. 411 (D. Minn. 1988).

review records in a title VII sex discrimination claim.[112] The defendant institution was unsuccessful in arguing that the case it filed in the District of Columbia took precedence under the court's "first filed rules." However, a faculty member filing a wrongful dismissal charge after tenure was denied was unable to gain access to peer review materials in an action in a Vermont court.[113]

A number of cases involved allegations of violations of constitutional or civil rights in the denial of tenure. For example, the Fifth Circuit Court found that a faculty member's equal protection guarantees were not violated when his lenient grading policy became an important factor in the tenure denial decision when grading policies were not considered in the decisions involving other probationary faculty under review.[114] In Idaho, a faculty member was able to show that speech about grades awarded in a seminar was a matter of public concern and an impermissible factor in the denial of tenure decision.[115] The court reinstated the faculty member and remanded the case for a determination of damages and attorneys' fees. In another case, a faculty member who was denied tenure filed four counts against the institution. The first three represented breach of contract and misrepresentation claims while the fourth count involved allegations of a decision emanating from protected speech.[116] The circuit court reversed the dismissal of the first three counts finding that the interrelated nature of the four counts mandated trial on all four counts not just the fourth count.

In claims of sex discrimination in the denial of tenure, a federal court ruled that after a jury verdict in favor of the faculty member, the plaintiff was entitled to reinstatement as a tenured associate professor and awarded damages for emotional distress under state law.[117] In a Pennsylvania case, a private university hired a black faculty member with the written understanding that part of his task was to help the institution build strong public relations with the community. The faculty committee recommended tenure and rated his public service and teaching as outstanding and his scholarship as satisfactory. However, the department head and those above him in the process gave no outstanding ratings and below satisfactory in research. The court found that from the evidence in the 1981 claim, the jury could deduce that the denial of tenure due to low ratings was a pretext for racial discrimination.[118] Noting that his job description required that he emphasize public relations and that his record in this area was clearly outstanding, the court found

112. EEOC v. University of Pa., 850 F.2d 969 (3d Cir. 1988).
113. Cockrell v. Middlebury College, 536 A.2d 547 (Vt. 1987).
114. Levi v. University of Tex. at San Antonio, 840 F.2d 277 (5th Cir. 1988).
115. Hale v. Walsh, 747 P.2d 1288 (Idaho Ct. App. 1987).
116. Spiegel v. Trustees of Tufts College, 843 F.2d 38 (1st Cir. 1988).
117. Brown v. Trustees of Boston Univ., 674 F. Supp. 393 (Mass. Dist. Ct. 1987).
118. Roebuck v. Drexel Univ., 852 F.2d 715 (3d Cir. 1988).

that the department head and those above him devalued those items and, logically, the jury could assume it was because of the plaintiff's race. The court reversed the lower court decision which had granted judgment in favor of the defendant institution on the title VII claim.

Similarly, a Delaware faculty member was able to show that failure to grant him tenure was a pretext for discrimination on national origin.[119] Pretext existed because the reason for denial was an attempt to upgrade the academic program, but the new job was advertised with the same qualifications possessed by the plaintiff. A state case reached similar pretextual conclusions.[120]

Part-time Faculty. A part-time faculty case involved the coverage of retirement benefits after the adjunct faculty member's death.[121] The faculty member had been employed on a regular basis by the institution and was under contract to teach the following summer with a commitment to teach in the fall. Just prior to the commencement of summer session he notified the department head that illness would prevent his teaching that summer and was told he would be offered a position for the fall. Upon his death in late summer the Public Employee Retirement Board ruled that since he was not employed and had failed to follow the conversion procedures, his widow would not qualify for death benefits. The court ruled that he was active in the retirement system, that he was a regular part-time employee, and that the proper notice of the conversion requirements had not been forwarded. The court ordered the payment of death benefits.

Tenured Faculty

Termination for Cause. Issues surrounding termination of tenured faculty for cause include the question of the existence of a tenure contract, due process requirements, claims that the termination was a violation of a constitutionally protected right, and the types of cause resulting in the termination. The question of the existence of tenure was before the Eleventh Circuit Court in a decision involving the transfer by the state legislature of the community college to the authority of the state system.[122] The court remanded the case, finding that the suit was not barred by the eleventh amendment.

Several cases involved the nature of contract. In a Florida case, a state court found that the faculty member was dismissed for failure to meet the terms of a mandatory disability leave agreement executed by both the

119. Ohemeng v. Delaware State College, 676 F. Supp. 65 (D. Del. 1988).
120. *In re* Brantley, 518 N.E.2d 602 (Ohio Ct. App. 1987).
121. Estate of Hagel v. Board of Trustees, 543 A.2d 1010 (N.J. Super. Ct. 1988).
122. Ezzell v. Board of Regents of Univ. Sys. of Ga., 838 F.2d 1569 (11th Cir. 1988).

plaintiff and his attorney.[123] Court action was time barred when the plaintiff failed to request a hearing within twenty-one days of notification of termination sent to his attorney. The Sixth Circuit Court found that a faculty member who resigned from the institution was not denied a property right when he was subsequently denied professor emeritus status.[124] Another court found that a faculty member had "constructively resigned" when she accepted a judgeship.[125] The refusal to reinstate the professor did not violate a property right or the first amendment. A District of Columbia faculty member was unable to successfully sustain a breach of contract claim over his suspension, three year grievance procedure, and subsequent reinstatement.[126]

A number of cases involved questions of due process. In Wisconsin, a faculty member who no longer could attract students to his class was reassigned to other administrative tasks, asked for a hearing, refused to resign, and was terminated when he failed to show up for work as an administrator.[127] The court found he was entitled to due process but was no longer employable as a faculty member because of illness. Damages should only be in the form of pay from the day he was terminated to the day final dismissal would have taken place had the proscribed procedures been followed.

Claims involving constitutional violations in termination of tenured faculty were litigated. In Washington, the court found that speech by the plaintiff, a dismissed tenured faculty member, was protected under the first amendment. However, the court found that the institution had a permissible reason to dismiss the plaintiff. His obscene language and excessive criticism of fellow faculty, creating an untenable situation in the work place, was not speech on matters of public concern, but rather employee speech. The Eleventh Circuit Court affirmed a remanded district court finding[128] that the plaintiff's disputes with administrators, viewed as disruptive of the work environment, were not matters of public concern.[129] However, evidence of sexual harassment of students not used at the termination hearings was inadmissible later in court as the rational for the dismissal. In another case, a medical college faculty member, facing charges of malpractice over the death of four patients and findings of negligence in patient care and resident supervision by internal and

123. Woodard v. Florida State Univ., 518 So. 2d 336 (Fla. Dist. Ct. App. 1988).

124. Samad v. Jenkins, 845 F.2d 660 (6th Cir. 1988).

125. Gonzalez de Brindle v. Reoyo, 686 F. Supp. 370 (D.P.R. 1988).

126. Press v. Howard Univ., 540 A.2d 733 (D.C. 1988).

127. Patterson v. Portch, 853 F.2d 1399 (7th Cir. 1988); *see* The Yearbook of School Law 1985 at 322, Patterson v. Board of Regents of Univ. of Wis. Sys., 350 N.W.2d 612 (Wis. Ct. App. 1984).

128. *See* The Yearbook of School Law 1986 at 250, Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985).

129. Harden v. Adams, 841 F.2d 1091 (11th Cir. 1988).

external panels, was asked to resign, which he did.[130] The court found that the resignation was not voluntary thereby rendering it a deprivation of property. A local newspaper contested the institution's attempt to have the records in this case sealed. The circuit court ordered the lower court to hold a hearing before sealing the records.[131]

In a case involving a decade of agitation by a faculty member of the denial of an NSF grant proposal, the court ruled that the plaintiff's public speech destroyed the harmony and working relationship of the institution and clearly became disruptive.[132] The saga of a decade of pursuit of the issue through the hierarchy of the university to the state police, the Federal Bureau of Investigation, the governor of the state, and a United States senator is replete with threats, harassment, and charges of criminal conduct bordering on defamation. The termination after what the court called a comprehensive due process procedure was initiated through a petition by the faculty of the college.

Another case involved a faculty member who was dismissed after a hearing committee found him guilty of sexual harassment of female students and the courts affirmed that the plaintiff's constitutional rights were not violated in the termination process.[133] The faculty member's widow brought a title VII claim which was rejected by the court.[134] They found that the issue raised, charges of sexual harassment alleged to be pretext for discrimination based on sex, had been resolved in the previous litigation filed under sections 1981 and 1983. A sports director and tenured faculty member was unsuccessful in alleging due process violations in his termination as either an administrator or a tenured faculty member.[135] A university audit found that he had used university funds and clerical support to operate several private business ventures and misused the name of the institution. In North Carolina, a faculty member was unsuccessful in alleging that the evidence before the hearing committee was inadequate to support the charges of sexual harassment of female students in his courses.[136]

Denial of Employee Privileges. Tenured faculty member privileges included issues such as temporary suspension, denial of promotion, censorship of classroom activity, and assignment of facilities. Two cases involved suspension for a period of time resulting from unacceptable

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130. Stone v. University of Md. Medical Sys. Corp., 855 F.2d 167 (4th Cir. 1988).
131. *Id.* at 178.
132. Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988).
133. *See* The Yearbook of School Law 1985 at 321, Levitt v. Monroe, 590 F. Supp. 902 (W.D. Tex. 1984); *see* The Yearbook of School Law 1986 at 251, Levitt v. University of Tex. at El Paso, 759 F.2d 1224 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 599 (1985).
134. Levitt v. University of Tex. at El Paso, 847 F.2d 221 (5th Cir. 1988).
135. Mueller v. Regents of Univ. of Minn., 855 F.2d 555 (8th Cir. 1988).
136. *In re* Kozy, 371 S.E.2d 778 (N.C. Ct. App. 1988).

behavior. In a case on appeal, the Second Circuit Court found that the due process rights of the faculty member were guaranteed through the college grievance procedure when he was suspended for two weeks for refusing to allow an evaluation team access to his class after students complained about his teaching.[137] The court also ruled that the dismissal of his first amendment claim by the lower court was an error and remanded the case for a hearing on the merits. In an Arizona case, the court found that the contract had not been breached when a faculty member was suspended for six months after a hearing tribunal found him guilty of serving cookies laced with marijuana at a class activity off campus.[138]

Several cases involved the denial of promotion. In one case, a faculty member alleged that his promotion was denied because of his public pronouncements on matters of public concern. Some of his pronouncements over the years in an ongoing dialog with the president of the institution were matters of public concern. Therefore, the district court errored in granting summary judgment to the defendant institution.[139] In another case, a faculty member denied promotion brought claims of defamation emanating from the contents of a memo from the department head.[140] The court found that the opinions in the memo were the result of the evaluation process to which the faculty member had opened herself in the application for promotion and were protected by the first amendment.

Free speech violations were alleged in the transfer of several professors to other departments. The court found that while the speech of the professors over the quality of the department were matters of public concern, they had become significantly disruptive and could be viewed as going to the very root of the problems of the department.[141] The court also found that the plaintiffs had no property right in the departmental assignment. Another case involved an attempt to censure a professor's classroom speech.[142] The circuit court dismissed the defendant's appeal which argued that a qualified immunity should have resulted in the district court grant of a summary judgment in favor of the institution.[143]

Several cases involved the allocation of resources. A Connecticut court found that a former dean did not have a property right to a specific salary and tenure as a professor because others had received that offer

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137. Naumanchiv. Board of Trustees of Conn. State Univ., 850 F.2d 70 (2d Cir. 1988).
138. Barrow v. Arizona Bd. of Regents, 761 P.2d 145 (Ariz. Ct. App. 1988).
139. Kurtz v. Vickrey, 855 F.2d 723 (11th Cir. 1988).
140. Germander v. Winona State Univ., 428 N.W.2d 473 (Minn. Ct. App. 1988).
141. Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988).
142. Mahoney v. Hankin, 844 F.2d 64 (2d Cir. 1988).
143. See The Yearbook of School Law 1985 at 325, Mahoney v. Hankin, 593 F. Supp. 1171 (S.D.N.Y. 1984).

when they stepped down as dean.[144] In an Illinois case, a faculty member at a private university failed to establish rights to the allocation of laboratory space for his cancer research.[145]

Termination Due to Financial Exigency or Program Elimination. A Washington court found that the institution followed the procedures spelled out in institutional documents when the board of regents voted to close a program and the two tenured faculty members were given termination notices, a hearing before a committee, and an appeal to a higher authority.[146] However, a Nebraska court found that an institution failed to meet its contractual obligations to a terminated faculty member when it failed to grant the request for a hearing.[147]

A California faculty member without tenure who headed two grant programs funded by the federal government was terminated by a vote of the department to phase the two programs out over the next two years.[148] The court found that the institution and its chancellor had acted arbitrarily when it ignored the findings of a hearing agent and continued to uphold the termination action.

Collective Bargaining

A long-standing litigation[149] between the Regents of the University of California and the state labor relations board was resolved by the Supreme Court.[150] The court found that the institution was required by Private Express Statute[151] to allow only the distribution of mail by their own mail service on matters which are "related" to the "current business" of the institution. The court found that the mail from the union to employees of the state colleges and universities about organizing a collective bargaining unit was a matter related to the union's current business and not the business of the state higher education system. The institution was correct in denying the union access to its mail services under the federal law.

The question of the jurisdiction of labor relations statutes over

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144. Barde v. Board of Trustees of Regional Community Colleges, 539 A.2d 1000 (Ct. 1988).

145. Williams v. Northwestern Univ., 523 N.E.2d 1045 (Ill. App. Ct. 1988).

146. Christensen v. Terrell, 754 P.2d 1009 (Wash. Ct. App. 1988).

147. Van Fossen v. Board of Governor, Cent. Technical Community College Area, 423 N.W.2d 458 (Neb. 1988).

148. Apte v. Regents of Univ. of Cal., 244 Cal. Rptr. 312 (Ct. App. 1988).

149. Regents of Univ. of Cal. v. Public Employment Relations Bd., 227 Cal. Rpt. 57 (Ct. App. 1986), note probable jurisdiction, *see* The Yearbook of School Law 1987 at 242, Regents of Univ. of Cal. v. Public Employment Relations Bd., 107 S. Ct. 3246 (1987).

150. Regents of Univ. of Cal. v. Public Employment Relations Bd., 108 S. Ct. 1404 (1988).

151. Private Express Statute, 18 U.S.C. §§ 1693-1699 (1978), 39 U.S.C. §§ 601-606 (1978), *see* exceptions 39 CFR § 310.3(C) (1987).

various institutions was before the courts. A Pennsylvania court found that the state system of higher education, the governing board for the fourteen public comprehensive colleges, did not fall under the provisions of the statutes which defined the jurisdiction of the state labor relations board.[152] In Ohio, a court found that the state labor relations board had no jurisdiction over unfair labor practices which occurred prior to the effective date of statutes which defined unfair practices.[153]

Questions surrounding the organization of employees into a collective bargaining unit were also before the courts. In New York, the court found that an employee could not claim retaliation for attempting to organize employees when discussions about employee issues fell short of the level of activity required to show a concerted effort to organize.[154]

In a bargaining unit designation case, the Fifth Circuit Court found that the faculty at Boston University were managerial employees not eligible to organize a bargaining unit. In a case on remand from the Supreme Court,[155] the court relied on the analysis of the *Yeshiva* case[156] and found that faculty decision-making authority made them managers.[157]

Two other cases involved membership in the bargaining unit. In Oregon, the court found that a bargaining unit which included research associates and assistants, instructors, and lecturers, but excluded tenure track faculty, could not be certified under statutory provisions defining antifragmentation criteria.[158] In Illinois, the court ruled that the directors of research centers and institutes were managerial employees excluded from the bargaining unit.[159]

Charges of unfair labor practices were also before the courts. In Connecticut, a court found that the termination of an employee at the end of the probationary period was a nongrievable managerial prerogative.[160] A New Jersey court found that the setting of the mandatory retirement age at seventy was a nonnegotiable managerial preroga-

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152. Conference of Pa. College of Police Officers v. Commonwealth Labor Relations Bd., 537 A.2d 108 (Pa. Commw. Ct. 1988).

153. State Employment Relations Bd. v. Ohio State Univ., 520 N.E.2d 597 (Ohio Ct. App. 1987).

154. Rosen v. Public Employment Relations Bd., 530 N.Y.S.2d 534 (N.Y. 1988); *see* The Yearbook of Education Law 1988 at 242, Rosen v. Public Employment Relations Bd., 510 N.Y.S.2d 180 (App. Div. 1986).

155. Trustees of Boston Univ. v. NLRB, 445 U.S. 912 (1980).

156. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

157. Boston Univ. Chapter AAUP v. NLRB, 835 F.2d 399 (1st Cir. 1987).

158. University of Or. Chapter, AFT v. University of Or., 759 P.2d 1112 (Or. Ct. App. 1988).

159. Board of Regents of Regency Univs. Sys. v. Illinois Educ. Labor Relations Bd., 520 N.E.2d 1150 (Ill. App. Ct. 1988).

160. State v. AFSCME, Council 4, 537 A.2d 517 (Conn. Ct. App. 1988).

tive.[161] However, the manner used to waive the age retirement provisions was a negotiable matter. In Vermont, the court found that the president's attempt to bring equity to faculty work loads by issuing workload guidelines which "excessively" increased the workloads of some faculty was an unfair labor practice, absent negotiation with the collective bargaining unit.[162]

However, an Oregon court found that it was not an unfair labor practice to cease bargaining with a bargaining organization because of an impending election or to refuse to accept the unratified agreement of the previous bargaining organization defeated in the election.[163]

Grievance procedures were also the subject of litigation. In the discharge of an employee, the court found the principal of *res judicata* applied where the merit board hearing officer found that the institution had valid reasons for the termination.[164] The state labor relations board could not also hear the grievance even when the institution advised the plaintiff that the merit board was the only available option and the plaintiff voluntarily chose that option. In another case, a state court ruled that state courts could not entertain the filing of a claim where proper administrative remedies (i.e., a hearing of the dispute by the state labor relations board, had not been exhausted.[165]

Arbitration issues were also litigated this year. Among the issues was the question of when the parties could go to arbitration. A Massachusetts court found that the parties could not go to arbitration during the term of an existing collective bargaining agreement.[166] In a New York case, the court affirmed an arbitrator's decision, even though he used a different reasoning to reach the same result as another arbitrator.[167]

Administrators and Staff

Claims in the termination of administrators and staff included questions of jurisdiction, constitutional rights involving property, speech, or discrimination, claims of breach of contract, and violation of state laws. An Idaho case involved the question of court jurisdiction in a dispute over

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161. University of Medicine and Dentistry of N.J. v. University of Medicine, Council AAUP, 538 A.2d 840 (N.J. Super. Ct. App. Dist. 1988).

162. Vermont State College Faculty Fed'n v. Vermont State College, 547 A.2d 1340 (Vt. 1988).

163. AFSCME Council 75 v. Oregon Health Sciences Univ., 755 P.2d 141 (Or. Ct. App. 1988).

164. Board of Governors of State Colleges and Univs. *ex rel.* Northeastern Ill. Univ. v. Illinois Educ. Labor Relations Bd., 524 N.E.2d 758 (Ill. App. Ct. 1988).

165. South Dakota Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988).

166. Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n, 522 N.E.2d 416 (Mass. 1988).

167. Rockland Community College Fed'n of Teachers, Local 1871 v. Trustees of Rockland Community College, 531 N.Y.S.2d 117 (App. Div. 1988).

the termination of a university employee. The state attempted to move the case from state court to federal court. The court found that eleventh amendment immunity and state statutes authorizing suit in state court to recover damages from the state necessitated the granting of the plaintiff's request to send the case back to state court.[168] In Colorado, the court found that the state personnel board does have authority to review the personnel director's determination on approval or rejection of a state service contract.[169]

The violation of constitutional rights in the termination of administrators was also before the court. In the lead case in this section, the court found that the institution possessed a "qualified immunity" from prosecution in a situation where the plaintiff is unable to substantiate constitutional claims in order to surmount the immunity defense.[170] Removal of a faculty member from the department head position was an administrative "discretionary function." A terminated community college dean could not sustain a constitutional claim simply because the institution did not follow the spelled out procedures for which state remedies are available.[171]

A number of cases raised the issue of the existence of a property right requiring due process. In New Mexico, the court found that the nonrenewal of a business manager's contract was not the denial of a property right.[172] In an Indiana case, the court found that while the plaintiff had no property right emanating from the institution's policy manual, material facts existed to warrant trial on whether a property right was acquired through university employment practices.[173] A surgeon's due process was provided during his request for reinstatement to the university hospital staff.[174] The hearing committee did not hear testimony on the surgeon's behalf, did not issue a written decision, and did not require the surgeon be represented by counsel.

Cases involving allegations of first amendment violations in terminations were also before the courts. In a Pennsylvania case, a summary judgment was granted on a discrimination claim but denied on a first amendment claim.[175] Material issues exist on the academic advisors' claim that they were dismissed for their public statements on discriminatory practices at the institution. Radio station programers were dismissed when they refused to stop reporting on a housing development and a political

168. Mazur v. Hymas, 678 F. Supp. 1473 (D. Idaho 1988).
169. University of S. Colo. v. State Personnel Bd. of Colo., 759 P.2d 865 (Colo. Ct. App. 1988).
170. Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988).
171. Fields v. Durham, 856 F.2d 655 (4th Cir. 1988).
172. Graff v. Glennen, 748 P.2d 511 (N.M. 1988).
173. Shannon v. Bepko, 684 F. Supp. 1465 (S.D. Ind. 1988).
174. Yashon v. Hunt, 825 F.2d 1016 (6th Cir. 1987).
175. Stokes v. Trustees of Temple Univ., 683 F. Supp. 498 (E.D. Pa. 1988).

campaign in which the college had an interest.[176] The court, citing an Alabama decision,[177] ruled that the radio station had the prerogative to set its own editorial policy and had not violated the first amendment rights of the program director.

In another case, the court found that while the pronouncements of an athletic director were matters of public concern, they were not protected when they became disruptive to the president's ability to maintain harmony within the college environment.[178] A Texas federal district court failed to grant a summary judgment in a termination case where first amendment rights, among others, may have been violated.[179] Material facts requiring adjudication existed in the termination of a health center clerk who sent memos to her supervisors identifying payroll irregularities. The District of Columbia Circuit Court found that an athletic director's statements about improprieties in the athletic program were matters of public concern but the "government's interest in efficient administration outweighed Hall's interest in speaking."[180] Finally, the president of the institution who publicly disclosed illegal activities of the business school dean and the chair of the board of trustees, was an at will employee and could be terminated for perceived deficiencies in leadership necessary to carry the school through troubled times.[181]

A college painter alleged that he was the victim of racial discrimination during his employment and sued for damages.[182] On appeal the court held that the employee was eligible for damages, activities of co-workers were discriminatory, and inactions of the supervisor raised additional allegations of racial discrimination. A police officer who refused to take a polygraph test sued alleging that protections against self-incrimination were violated.[183] The court remanded the case on the self-incrimination issue.

Claims of a breach of contract were alleged in several termination cases. In Massachusetts, the court found that the terminated director of a department was discharged for valid reasons.[184] Termination for strained relationships with some of the faculty did not breach the employment

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176. Schneider v. Indian River Community College Found., Inc., 684 F. Supp. 283 (S.D. Fla. 1987).

177. Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982).

178. Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988).

179. Schweitzer v. University of Tex. Health Center at Tyler, 688 F. Supp. 278 (E.D. Tex. 1988).

180. Hall v. Ford, 856 F.2d 255, 259 (D.C. Cir. 1988).

181. Rinehimer v. Luzerne County Community College, 539 A.2d 1298 (Pa. Super. Ct. 1988).

182. Jones v. Los Angeles Community College Dist., 244 Cal. Rptr. 37 (Ct. App. 1988).

183. Truesdale v. University of N.C., 371 S.E.2d 503 (N.C. Ct. App. 1988).

184. Klein v. President and Fellows of Harvard College, 517 N.E.2d 467 (Mass. App. Ct. 1987).

contract. Termination of an employee serving "at will" did not breach an employment contract.[185] In Maryland, a terminated development officer could not maintain a claim of constructive and wrongful discharge when the president asked for and received his resignation but later gave him an opportunity to rescind it.[186] In Minnesota, a tenured professor's contract was not breached when the institution failed to appoint him department chair.[187] However, in Arizona, the court found that a covenant to employ the head basketball coach for four years was breached when he was terminated after the first year.[188] In another case, the matter was remanded to the jury for a determination of whether extenuating circumstances existed so as to allow the institution to take action not consistent with its procedures.[189] A former dean, who executed a consent decree when he was transferred to another administrative position, received fair and equitable salary increases consistent with policy and in conformity to the consent decree according to the court.[190]

Several cases concerning termination involve state laws and statutes. The court found that a custodian's dismissal for misconduct did not violate the state civil service laws.[191] In another case, the court found that the employment commission's decision was arbitrary and capricious in rejecting the appeal of a full-time employee not hired for a university personnel office position.[192] The court found that state law required that positions, when practical and feasible, should be filled by qualified, full-time employees. A police officer who claimed that the institution criticized him for making arrests on campus, was unable to support a claim of termination in violation of the Whistleblowers' Protection Act.[193]

Several termination cases resulted in the award of damages. In one case, the court reduced the amount of the damages but affirmed the award for slanderous activity emanating from statements made to a prospective employee of the plaintiff.[194] In Colorado, the court reversed the award of back-pay but ordered the employee reinstated in a wrongful termination.[195] An Oregon court affirmed the back-pay award and added

185. Gomez v. Trustees of Harvard Univ., 676 F. Supp. 13 (D.D.C. 1987).
186. Board of Trustees of State Univs. and Colleges v. Finerau, 541 A.2d 170 (Md. Ct. Spec. App. 1988).
187. Goodkind v. University of Minn., 417 N.W.2d 636 (Minn. 1988).
188. Lindsey v. University of Ariz., 754 P.2d 1152 (Ariz. Ct. App. 1987).
189. Goldhor v. Hampshire College, 521 N.E.2d 1381 (Mass. App. Ct. 1988).
190. Hanson v. Hearn, 521 So. 2d 953 (Ala. 1988).
191. Johnson v. Whitfield, 521 So. 2d 641 (La. Ct. App. 1988).
192. Joyce v. Winston-Salem State Univ., 370 S.E.2d 866 (N.C. Ct. App. 1988).
193. Dickson v. Oakland Univ., 429 N.W.2d 640 (Mich. Ct. App. 1988); Whistleblowers' Protection Act, Mich. C.L. §§ 15.361 *et seq.* (1976).
194. St. Clair v. Trustees of Boston Univ., 521 N.E.2d 1044 (Mass. App. Ct. 1988).
195. Beardsley v. Colorado State Univ., 746 P.2d 1350 (Colo. Ct. App. 1987).

the award of attorney's fees in the wrongful termination of a State Board of Higher Education employee.[196]

Denial of Employee Benefits. Cases before the courts included denial of benefits to employees involving benefits such as retirement, summer employment, and unemployment compensation. The state passed a bill exempting certain income from the calculation of the employer's contribution for college teachers to the state retirement system. The governor vetoed that part of the legislation based on the wording in the bill, declaring an emergency. Oregon taxpayers brought suit alleging that a governor's veto was invalid and, therefore, asked the court to stop the state's contributions to the retirement system under the old formula.[197] The court ruled that the veto power of the governor covered only the emergency provisions within the bill and did not extend to the provisions in question. The legislation, therefore, was enacted and must be used to determine the employer contribution. In another state, the court found that professional university employees were not eligible for longevity pay awarded for extended employment with the state.[198]

A number of cases dealt with the denial of benefits to specific individuals. A music teacher was not successful in his claim of rights violations because he was moved from an individual instruction mode of teaching piano to a classroom mode.[199] In another case, wages for a summer appointment were withheld when the faculty member refused to comply with an executed early retirement agreement by submitting his resignation.[200] The court ruled that summer appointments were not covered by the state's wage protection act and that the university had not breached the contract or good faith dealing by withholding part of the summer salary. In New York, the court affirmed the existence of a contract and found it had been breached when an employee's two-year appointment was rescinded.[201]

Questions surrounding unemployment compensation were also litigated. In Pennsylvania, a court found that the layoff of employees during the spring term did not constitute a layoff between terms as described by the statute and unemployment benefits were awarded.[202] However, an Oregon court denied an award of unemployment compensation to an employee not employed for the summer but with a reasonable assurance

196. Lofft v. State Bd. of Higher Educ., 750 P.2d 515 (Or. Ct. App. 1988).
197. Lipscomb v. State Bd. of Higher Educ., 753 P.2d 939 (Or. 1988).
198. Roberts v. State, 752 P.2d 221 (Nev. 1988).
199. Lewis v. Midwestern State Univ., 837 F.2d 197 (5th Cir. 1988).
200. Julian v. Montana State Univ., 747 P.2d 196 (Mont. 1987).
201. Merschrod v. Cornell Univ., 527 N.Y.S.2d 109 (App. Div. 1988).
202. Katz v. Commonwealth, Unemployment Compensation Bd. of Review, 540 A.2d 624 (Pa. Commw. Ct. 1988).

of re-employment in the fall term.[203] Other cases resulted in the denial of unemployment benefits.[204]

Sexual Harassment. The question of sexual harassment resulting in the termination of employees was before the courts. In New York, the court found that the evidence of the exploitation of two female employees under the terminated employee's supervision was sufficient evidence to justify the termination.[205] In South Carolina, the court found the university had no basis to stop the hearing of a grievance over a former employee's attempt to rescind a resignation after being confronted with allegations of sexual harassment.[206] However, a Minnesota court found that the letters and statements of affection made by one employee to another employee whom he no longer supervised, which immediately ceased upon request, were not sexual harassment, but rather an attempt to establish a personal relationship.[207] The court ruled that the employee would be eligible for unemployment compensation.

Finally, a New Jersey case involving sexual harassment charges brought against a doctor and a hospital saw the denial of summary judgments in both state[208] and federal[209] courts. The plaintiff became a patient for a psychiatrist for whom she worked as a secretary and commenced a romantic relationship with the doctor. Her claim alleged sexual harassment and retaliation in her termination after the expiration of her medical leave and the rejection of a position offered to her.

STUDENTS

The student litigation is diverse. Financial aid cases involving loan default or bankruptcy continue to be substantial in number. Cases involving child support for college in divorce were also litigated. First amendment freedom of speech, religion, association, and commercial speech rights continue to be litigated by students.

Admissions

A law school applicant appealed the denial of his enrollment in three consecutive calendar years.[210] In previous complaints, the plaintiff al-

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203. Employment Div., Dep't of Human Resources v. Epstein, 752 P.2d 1295 (Or. Ct. App. 1988).

204. *In re* Alexander, 522 N.Y.S.2d 988 (App. Div. 1988); *In re* Council, 523 N.Y.S.2d 212 (App. Div. 1987); Hollensbe v. Iowa Dep't of Job Servs., 418 N.W.2d 77 (Iowa Ct. App. 1987).

205. Crookston v. Brown, 528 N.Y.S.2d 908 (App. Div. 1988).

206. Medical Univ. of S.C. v. Taylor, 362 S.E.2d 881 (S.C. Ct. App. 1987).

207. Gradine v. College of St. Scholastica, 426 N.W.2d 459 (Minn. Ct. App. 1988).

208. Fuchilla v. Layman, 537 A.2d 652 (N.J. 1988).

209. Fuchilla v. Prockop, 682 F. Supp. 247 (D.N.J. 1987).

210. Hall v. State, 756 P.2d 1048 (Hawaii 1988).

leged the law school's admission policies and procedures, including its predomination program, discriminated against him, favoring a group of applicants of which he is not a member. Under the doctrine of *res judicata*, the court affirmed that the applicant's claims were barred by dismissal of prior federal action. The Deputy Attorney General had not libeled and defamed the applicant when he disclosed the applicant's score on the law school admission test in defense against the claim.

In the denial of a readmission decision of a black student suffering from alcoholism, the federal circuit court of appeals affirmed a lower court decision[211] that race was not a factor. The law school may consider academic prospects and sobriety in its decision to readmit. Furthermore, the court held that the student was not an otherwise qualified handicapped individual under the handicapped law.[212]

Nonresident Tuition

In a suit against a community college district, the United States sought to recover overpayments to a college under a Veterans Administration educational program.[213] Since the government's action was determined to be barred by the six year statute of limitations and, therefore, not substantially justified, the community college sought and received attorneys' fees and other sanctions against the government.[214]

Financial Aid

Cases involving the authority of the funding agency over constitutional financial aid programs were limited. A private university and individual defendants await trial for charges of conspiracy to commit theft, theft, and forgery as a result of allegedly making and submitting false documents to receive Basic Educational Opportunity Grant funds and other state scholarship and grant funds. A state court reversed a previous decision to dismiss the forgery charges, determined that the corporation was properly indicted for forgery, and dismissed an appeal from the state to reverse the lower court order to join the theft and conspiracy charges.[215]

In Kentucky, a junior college, participating in the Pell Grant Program and other federal campus-based federal financial aid programs, allegedly failed consistently to abide by all regulations and program requirements.

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211. *See* The Yearbook of Education Law 1988 at 248, Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987).

212. Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).

213. *See* The Yearbook of Education Law 1988 at 253, United States v. Gavilan Joint Community College Dist., 662 F. Supp. 309 (N.D. Cal. 1986).

214. United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1988).

215. People v. East-West Univ., Inc., 516 N.E.2d 4882 (Ill. App. Ct. 1987).

The Department of Education transferred the college to a reimbursement plan rather than the advance plan in which the institution may withdraw requested funds as needed. The college challenged the transferral of payment method for the financial aid expenditures. The court determined that no statutory or constitutional violations occurred.[216]

In New York, the court dismissed an appeal by a recipient of vocational rehabilitation services.[217] The court upheld a tuition-funding cap instituted by the agency and affirmed that a counselor's verbal assurance of full-funding did not require the commission to provide full tuition. In Pennsylvania, the court affirmed that a full-time student was not eligible for cash and medical assistance unless he had participated in a federal program for dependent children for five years.[218] The student was allowed to receive food stamps. The AFDC benefits received by a student were canceled by a state department since her income resulting from an educational loan exceeded the maximum limit.[219] The court upheld the calculations that the available money assisted with general living expenses.

A significant number of chapter seven bankruptcy cases were brought before the court. Educational loans were not discharged in several cases: the debtor had the present and future ability to meet his obligations without undue hardship;[220] a repayment was deferred until the debtor's daughter had graduated from college;[221] the bankruptcy petition was filed in an untimely manner and failed to list the educational loans;[222] a parent as endorser was responsible for repayment;[223] and an installment loan to pay off student loans was not discharged in the bankruptcy proceedings.[224] A debtor sought to revoke his own discharge in a chapter seven case since the discharge bars further discharge over five years. The court refused to grant relief.[225] In several cases, educational loans were discharged. A debtor's loan was discharged under a chapter thirteen bankruptcy case

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216. Bowling Green Jr. College v. United States Dep't of Educ., 687 F. Supp. 293 (W.D. Ky. 1988).

217. Fogel v. Perales, 522 N.Y.S.2d 283 (App. Div. 1987).

218. Yamushko v. Department of Pub. Welfare, 543 A.2d 1277 (Pa. Commw. Ct. 1988).

219. Wise v. Iowa Dep't of Human Servs., 424 N.W.2d 432 (Iowa 1988).

220. Connor v. Michigan Dep't of Treasury, 83 Bankr. 440 (Bankr. E.D. Mich. 1988); Childs v. Higher Educ. Assistance Found., 89 Bankr. 819 (Bankr. D. Neb. 1988); Courtney v. Gainer Bank, 79 Bankr. 1004 (Bankr. N.D. Ind. 1987); Garmerian v. Rhode Island Higher Educ. Assistance Auth., 81 Bankr. 4 (Bankr. D.R.I. 1987); Pendergrast v. Student Loan Servicing Center, 90 Bankr. 92 (Bankr. M.D. Pa. 1988).

221. Conner v. Illinois State Scholarship Comm'n, 89 Bankr. 744 (Bankr. N.D. Ill. 1988).

222. United States v. Putzi, 91 Bankr. 42 (Bankr. S.D. Ohio 1988).

223. Barth v. Wisconsin Higher Educ. Corp., 86 Bankr. 146 (Bankr. W.D. Wis. 1988).

224. Nicolay v. Georgia Higher Educ. Assistance Corp., 370 S.E.2d 660 (Ga. Ct. App. 1988).

225. *In re* Tuan Tan Dinh, 90 Bankr. 743 (Bankr. E.D. Pa. 1988).

and was ruled to remain discharged under a subsequent chapter seven petition;[226] the statute of limitations expired disallowing legal action to seek recovery;[227] and the debtor would have suffered undue hardship in paying back the loan.[228]

Equally before the court were cases involving chapter thirteen of the bankruptcy laws. In one case, the court held the creditor, the collection agency, and the law firm in contempt for willfully violating an automatic stay in attempting to collect a student loan debt.[229] The courts did not confirm several chapter thirteen plans because the plans were not proposed in "good faith,"[230] the debt could not be considered as a long term debt.[231] In one case, a debtor's chapter thirteen plan was modified to increase his monthly repayment since there was a substantial change in his circumstances.[232] Two chapter thirteen plans were confirmed as a result of the "good faith" on the part of debtors who devoted all of their disposable income to debt[233] and of a debtor who earned a regular income.[234]

Several debtors were found to be in breach of a service contract when they failed to complete the required service as stipulated in the award of scholarships. Two debtors failed to serve the required obligation[235] and another debtor resigned prior to service.[236]

Several issues were raised involving the collection of overdue loans. The courts upheld the Department of Education's action to offset a student's debt against a debtor's income tax return,[237] as well as state agencies' use of the same process on the state level.[238] In other cases, courts held that a student was liable for the entire balance in the case of default,[239] that payment on an overdue loan reinstated the statute of limitations,[240] that a leave of absence from school was equivalent to

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226. Edson v. Wisconsin Higher Educ. Corp., 86 Bankr. 141 (Bankr. E.D. Wis. 1988).
227. New York Higher Educ. Servs. Corp. v. Langus, 527 N.Y.S.2d 665 (App. Div. 1988).
228. Zobel v. Iowa College Aid Comm'n, 80 Bankr. 950 (Bankr. N.D. Iowa 1986).
229. Haile v. New York State Higher Educ. Servs. Corp., 90 Bankr. 51 (W.D.N.Y. 1988).
230. *In re* Newberry, 84 Bankr. 681 (Bankr. E.D. Cal. 1988); Ohio Student Loan Comm'n v. Doersam, 849 F.2d 237 (6th Cir. 1988).
231. *In re* Hayes, 83 Bankr. 2 (S.D. Ohio 1987).
232. *In re* Gronski, 86 Bankr. 428 (Bankr. E.D. Pa. 1988).
233. *In re* Adamu, 82 Bankr. 128 (Bankr. D. Or. 1988).
234. *In re* Ellenburg, 89 Bankr. 258 (Bankr. N.D. Ga. 1988).
235. United States v. Roper, 681 F. Supp. 77 (D. Me. 1988); United States v. Conway, 686 F. Supp. 571 (E.D. La. 1988).
236. United States v. Avila, 687 F. Supp. 778 (W.D.N.Y. 1988).
237. Hurst v. United States Dep't of Educ., 695 F. Supp. 1137 (D. Kan. 1988); Thomas v. Bennett, 856 F. Supp. 1165 (8th Cir. 1988).
238. Wightman v. Franchise Tax Bd., 249 Cal. Rptr. 207 (Cal. Ct. App. 1988).
239. United States v. Salzillo, 694 F. Supp. 1560 (N.D. Ga. 1988).
240. United States v. Milam, 855 F.2d 739 (11th Cir. 1988).

withdrawal requiring payment,[241] that the guarantee association was not required to disseminate standards and procedures concerning approval of forbearance to borrowers,[242] and that an indirect student loan did not allow a debtor to avoid her obligation through employment by the state.[243] A case was remanded with instructions to vacate a default judgment when a process server attempted to serve the defendant at a fraternity house in which the student had not resided for over a year.[244]

Two cases involved veterans benefits. In one case, two veterans, honorably discharged from the military, sought an extension on the ten year period of educational assistance benefits. Their request was denied on the grounds that they were disabled by primary alcoholism, ruled as willful conduct by the Veterans' Administration. The Supreme Court held that the denial of an extension did not violate section 504 which requires that federal programs not discriminate against handicapped persons solely because of their handicap.[245] In another case, a state comptroller refused to reimburse a community college the entire cost of providing veterans' scholarships since the governor and the state legislature only partially funded the program. The court[246] held that the comptroller acted properly and that the state's failure to fund the program adequately did not impose a new duty on the college.[247]

Two cases were brought to the courts which are related to financial aid tangentially. A man posted a job listing through an employment office which is a part of the financial aid office at a public university. The listing was canceled after student interviewees complained about the prospective employer. The court held that the student complaints were not public records and therefore not subject to public inspection.[248] In the second case, a parent of a prospective college student brought action against a life insurance company alleging written and oral misrepresentation. The court held that the buyer had the actual terms of the student loan available at the time of the alleged oral misrepresentation so that the buyer could not prove fraud; the buyer's claim for actual damages was remanded.[249]

A number of cases in which assistance for college costs in child

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241. Bell v. New York Higher Educ. Assistance Corp., 526 N.Y.S.2d 319 (Sup. Ct. 1987); *see also* Bell v. New York Higher Educ. Assistance Corp., 526 N.Y.S.2d 316 (Sup. Ct. 1987).

242. Higher Educ. Assistance Found. v. Singh, 416 N.W.2d 750, aff'd in part, 428 N.W.2d 384 (Minn. 1988).

243. Georgia Higher Educ. Assistance Corp. v. Geldon, 371 S.E.2d 449 (Ga. Ct. App. 1988).

244. Dorsey v. Gregg, 748 P.2d 154 (Or. Ct. App. 1988).

245. Traynor v. Turnage, 108 S. Ct. 1372 (1988).

246. Board of Trustees of Community College Dist. No. 508 v. Burris, 515 N.E.2d 1244 (Ill. 1987).

247. Ill. Rev. Stat., ch. 85, § 2201 (1983).

248. Spadaro v. University of N.M. Bd. of Regents, 759 P.2d 189 (N.M. 1988).

249. Watson v. First Commonwealth Life Ins. Co., 686 F. Supp. 153 (S.D. Miss. 1988).

support agreements were brought before the court. A professional acting school was judged not to be a college, alleviating a parent's obligation for support.[250] In another case, the language of the divorce agreement was contested. The court determined that "normal cost" additionally included room expenses, summer school tuition, and health fees.[251] In Pennsylvania, the court reversed a decision to require a father to contribute to his son's education since it would create a hardship for the father at present.[252] Finally, a court reversed a decision to apportion a child's needs and the responsibilities for a child's college education on the basis of the ratio of the parents' gross income.[253]

First Amendment

Freedom of Religion. In the District of Columbia, a private Catholic university refused to grant homosexual student associations official university recognition, prohibiting them from receiving tangible benefits and services from the university. The student groups contended that the university violated the District's Human Rights Act which prohibits educational institutions from discriminating against any individual on the basis of sexual orientation.[254] The court, affirming a lower court decision,[255] held that while the Act did not require the university to recognize the groups, it could not deny the tangible benefits on the basis of their sexual orientation. The District had compelling interest in eliminating discrimination which outweighed the burden upon the university's free exercise of religion.[256]

Freedom of Speech. A state college received a letter of inquiry setting forth alleged violations from a collegiate athletic association. Combined local and national news media alleged that the college, by not disclosing the letter to the media, violated their right of access under the first and fourteenth amendments and under the state's Open Records Act.[257] The court found no tradition of access in the state and that access to all sources of information is not mandated by the first amendment and would not play a positive role in the college and association investigations

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250. Hacker v. Hacker, 522 N.Y.S.2d 768 (Sup. Ct. 1987).
251. Rumbaugh v. Rumbaugh, 428 N.W.2d 500 (Neb. 1988).
252. Chesonis v. Chesonis, 538 A.2d 1376 (Pa. Super. Ct. 1988).
253. *In re* Marriage of Stockton, 523 N.E.2d 573 (Ill. App. Ct. 1988).
254. D.C. Code § 1-2520 (1987).
255. *See* The Yearbook of School Law 1986 at 269, Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ., 496 A.2d 5677 (D.C. Cir. 1985), *vacated, reh'g granted*, 496 A.2d 578 (D.C. Cir. 1985).
256. Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).
257. 51 Okla. Stat. § 24A.

and, therefore, a first amendment right of access to the letter did not exist.[258]

In a question of access to a presidential debate hosted by a state-supported university, a presidential candidate who had not been invited sued.[259] The court determined that the first amendment does not guarantee the right to communicate one's views at all times and places. A university has broad discretion in administering its affairs and can limit invitations to major candidates since such a decision was not content based.

Black football players, complaining that they were treated in a racially-discriminating manner by the coaching staff and administration, boycotted team practices and were removed from the football team. They brought suit against the university and its officials, claiming violations of their free speech, liberty, and property rights, and breach of contract.[260] The court determined that the players had no property rights or liberty interests and that no breach of contract occurred; scholarships, not positions on the football team, were promised and delivered by the university. The court found genuine issues of fact to exist on alleged violations of free speech and the plaintiffs' claim of discrimination in the award of scholarships.

A public university student appealed his conviction of wanton injury to property committed during a demonstration on campus. The plaintiff alleged that the legal action was retaliation for his exercise of free speech. The court affirmed the lower court, finding no evidence of retribution due to the content of the defendant's speech.[261]

A journalism instructor at a community college brought suit for an alleged violation of first amendment rights when funding for the community college student newspaper was terminated.[262] The court affirmed that the editorial content of the student newspaper was not the substantial or motivating factor in the decision but rather the plaintiff's failure to comply with student government fiscal policies. A related case involved the termination of the legal services office at a public university.[263] The district court held that the office, originally authorized by the university's board of trustees, was, at most, a limited public forum and that the board's termination of the office and services was content-neutral and, therefore, was not violative of the first amendment.

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258. Combined Communications Corp. of Okla., Inc. v. Boger, 689 F. Supp. 1065 (W.D. Okla. 1988).

259. Martin-Trigona v. University of N.H., 685 F. Supp. 23 (D.N.H. 1988).

260. Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940 (D. Kan. 1987).

261. Commonwealth of Ruddock, 520 N.E.2d 501 (Mass. Ct. App. 1988).

262. Olson v. State Bd. for Community Colleges and Occupational Educ., 759 P.2d 829 (Colo. Ct. App. 1988).

263. Student Gov't Ass'n v. Board of Trustees of Univ. of Mass., 676 F. Supp. 384 (D. Mass. 1987).

The Fourth Circuit Court affirmed a district court decision[264] approving a university's revised lawn-use policy. The policy requiring the removal of symbolic shanties erected by students was content-neutral, narrowly tailored to meet a significant government interest, and left open other channels of communication consistent with the first amendment.[265] In another case, an association of university students and faculty members alleged that regulations controlling the university's designated public forum denied them their rights under the first and fourteenth amendments. The court found that the university's regulations were content-neutral, not ambiguous, and reasonable designations of time, place, and manner of speech.[266]

Freedom of Expression. The Eighth Circuit Court reversed a lower court's dismissal[267] of a gay student association suit against public university officials for violation of the association's first amendment rights as a result of the denial of funding requests. The case presents a live issue as the action is capable of repetition yet may evade review. State action was present since the university official, through an appeals process, had the final determination in funding. The denial of funding was found to be content-motivated and a violation of the association's first amendment rights resulted.[268]

In a case previously before the courts,[269] the litigation concerned commercial free speech. At trial,[270] the joint plaintiffs (students and the corporation) were denied sales activities in dormitory rooms. On appeal by the students, the court, reversing the previous decision, held that students had the constitutional right to receive information in their public university dormitory rooms. The case was remanded to review the university's regulation limiting commercial solicitation in dormitory rooms.[271]

Freedom of Association. In California, students at a public university alleged that a mandatory student activities fee was a violation of their constitutional rights of association and speech and of the establishment clause.[272] The court determined that the board of regents, deriving its

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264. *See* The Yearbook of Education Law 1988 at 253, Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 33 (W.D. Va. 1987); 671 F. Supp. 1105 (W.D. Va. 1987).

265. Students Against Apartheid Coalition v. O'Neil, 838 F.2d 725 (4th Cir. 1988).

266. Auburn Alliance for Peace and Justice v. Martin, 684 F. Supp. 1072 (M.D. Ala. 1988).

267. *See* The Yearbook of Education Law 1988 at 255, Gay and Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045 (W.D. Ark. 1987).

268. Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988).

269. *See* The Yearbook of Education Law 1988 at 308, American Future Sys. v. State Univ. of Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983).

270. *See* The Yearbook of Education Law 1988 at 254, Fox v. Board of Trustees of State Univ. of N.Y., 649 F. Supp. 1393 (N.D.N.Y. 1986).

271. Fox v. Board of Trustees of State Univ. of N.Y., 841 F.2d 1207 (2d Cir. 1988).

272. Smith v. Regents of Univ. of Cal., 248 Cal. Rptr. 263 (Ct. App. 1988).

power from the state Constitution, has the authority to assess a mandatory student activities fee as a condition of enrollment. Furthermore, organizations involved in political or religious activities were ineligible for funding. Membership in the student government association is voluntary; students are not compelled to join. The need for student government justifies any interference with associational rights.

Dismissal

Disciplinary Dismissal. Two disciplinary dismissal cases questioned the involvement of state action in private colleges. Private college students on the editorial board of an independent student newspaper dismantled a symbolic protest of the college's South African investments erected by other students and conducted a "sting" operation on a local inn to expose the alleged sale of alcohol to underage students. The students brought action against the college and its officials alleging that the disciplinary action resulting from their conduct violated their constitutional rights.[273] The court dismissed the case finding that there was no relationship between the private college and the state. No state action existed to satisfy section 1983 liability.[274]

In a second case,[275] students were suspended from a private college after violating a restraining order enjoining them to vacate the administration building and ignoring the explicit warnings of the dean of students.[276] The students alleged that the college was a state actor by virtue of a 1969 state statute[277] requiring colleges to adopt disciplinary rules to maintain public order on campus, mandating the private institution to uphold the same guarantees required of the state under the United States Constitution. The Second Circuit Court held that under the Henderson Act, the state never sought to compel schools to enforce their rules or inquire about enforcement; state action did not exist. The case was remanded to allow the appellants to amend their complaint under the statute which applies to acts of private racial discrimination.[278]

Two students brought separate actions against their institutions seeking injunctive relief from the decisions of disciplinary hearings. In Rhode Island, a student at a public university alleged violation of his constitutional rights of due process.[279] Bias was not present when an administrator with

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273. Stone v. Dartmouth College, 682 F. Supp. 106 (D.N.H. 1988).
274. 42 U.S.C. § 1983.
275. Albert v. Carovano, 851 F.2d 561 (2d Cir. 1987).
276. *See* The Yearbook of Education Law 1988 at 255, Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987).
277. N.Y. Education Law § 6450 (McKinney 1985).
278. 42 U.S.C. § 1981.
279. *See* The Yearbook of School Law 1987 at 266, Gorman v. University of R.I., 837 F.2d 7 (1st Cir. 1988).

previous involvement with the case was the hearing officer. While the plaintiff was denied the opportunity to tape the proceedings, written accounts sufficed. Denial of legal counsel but access to advice and cross-examination provision adequately conformed to due process requirements. The district court held that the disciplinary hearings violated the student's right to due process.[280] The First Circuit Court found that there was no deprivation of due process. In the second case, a student in a private college requested a preliminary injunction against a one-year suspension from attendance at college. The court upheld the denial of the injunction as the student failed to establish irreparable harm.[281]

A student dismissed from a proprietary business school for alleged disruptive conduct brought suit for breach of contract.[282] On remand from an appeal,[283] the trial court found that the student breached her contractual duties as a responsible adult by creating turmoil. The appeals court, finding that the school did not prove that the plaintiff disrupted the scholastic program, reversed the judgment and ordered the return of tuition and the payment of general damages for the delay in the student's academic career.

A first year medical student in a private university sought to annul a penalty of a compulsory one-year leave of absence for cheating on an examination for the second time.[284] A New York appeals court held that the university's determination in an academic dishonesty disciplinary action was neither arbitrary nor capricious, that the penalty was not unfair, and that state financial assistance alone does not invoke state action and therefore due process requirements. In a second academic dishonesty disciplinary case, a black law student accused of plagiarism brought suit against the law school alleging violation of his civil rights. The court of appeals, affirming a lower court decision, found that recusal by the judge who had graduated from the law school was not required but, while retaining jurisdiction, remanded the case for an evidentiary hearing concerning the judge's impartiality.[285]

Academic Dismissal. Four cases challenged the application of due process procedures. Ten former nursing students at a public university's

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280. Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986).

281. Schulman v. Franklin & Marshall College, 548 A.2d 49 (Pa. Super. Ct. 1988).

282. *See* The Yearbook of School Law at 1986 at 279, Fussell v. Louisiana Business College of Monroe, 519 So. 2d 384 (La. Ct. App. 1988).

283. *See* The Yearbook of School Law 1986 at 279, Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652 (La. Ct. App. 1985).

284. Beilis v. Albany Medical College of Union Univ., 525 N.Y.S.2d 932 (App. Div. 1988).

285. Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988). *See also* The Yearbook of School Law 1987 at 266, 632 F. Supp. 1539 (E.D. Mich. 1986), 627 F. Supp. 580 (E.D. Mich. 1986); *see also* The Yearbook of School Law 1986 at 272, 619 F. Supp. 418 (E.D. Mich. 1985).

college of nursing appealed a lower court's dismissal of their complaint against the trustees and officials of the college.[286] The students were dismissed from the program and alleged that they were deprived of due process. They further alleged that the dismissals resulted from an effort to reduce the number of graduates from the program. The Seventh Circuit Court affirmed that state officials were entitled to qualified immunity from damages in their official capacities under the eleventh amendment, but reversed as error the lower court decision which dismissed the injunctive relief claim.

In a second nursing school case, a third-year student in a hospital school was dismissed from the program after having failed to meet seven specific clinical objectives. The student brought action against the school alleging a violation of due process.[287] The Court of Appeals affirmed that the student was clearly advised of the requirements, given notice of her deficiencies and given an opportunity to respond. The administration followed its established procedures for academic dismissal and gave the student an opportunity to reapply. The dismissal was not arbitrary and capricious. Damages were moot since the student completed her nursing education at another school.

A medical resident brought suit against the hospital and several doctors, alleging sex discrimination and a violation of due process after receiving an unsatisfactory academic evaluation.[288] The court determined that the hospital and one doctor who employed the student did not have immunity from suit under a statute covering discrimination in employment[289] resulting from an unfavorable evaluation. Since the evaluation was academic, not disciplinary, no liberty or property right was at stake, triggering procedural due process. In another case, a doctor serving a residency at a hospital brought action against the state for breach of contract when she was prohibited from entering her third year of residency. The court dismissed the claim since the employment contract was not filed with and approved by the state comptroller and since an appointment for residency, like student academic performance questions, was a professional discretionary action and, therefore, was nonjusticiable.[290]

In Delaware, a student in a public university brought suit for alleged violations of her civil rights and for breach of contract.[291] The student,

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286. Akins v. Board of Governors of State Colleges and Univs., 840 F.2d 1371 (7th Cir. 1988).

287. Morin v. Cleveland Metro. Gen. Hosp. School of Nursing, 516 N.E.2d 1257 (Ohio Ct. App. 1986).

288. Samper v. University of Rochester Strong Memorial Hosp., 528 N.Y.S.2d (Sup. Ct. 1987).

289. New York Human Rights Law Section 296; Education Law Section 6527; Public Health Law Sections 2805-j and 2805-m 3.

290. Lachia v. State, 528 N.Y.S.2d 963 (Ct. Cl. 1988).

291. Paoli v. University of Del., 695 F. Supp. 171 (D. Del. 1988).

majoring in elementary teacher education, enrolled in an optional academic program in order to receive teacher certification. She failed a teaching methods course (a prerequisite for student teaching), never retook the course, never student taught, and never achieved teacher certification. The court found that failure to achieve teacher certification was a voluntary action for which the institution is not held accountable. Additionally, the university demonstrated that it consistently enforced the teacher certification requirements and its action was not arbitrary and capricious for similarly situated students.

The Fourth Circuit Court affirmed the dismissal of a doctor's suit against a public university, a hospital, and several individual doctors alleging libel and slander.[292] The doctor was ineligible to take his board certification due to an unsatisfactory clinical skills rating in his residency program. The court determined that the doctor failed to make a sufficient, timely effort to see his university records, allowing the time to file a defamation suit to run out.

Two cases of licensing of professionals by the state concern issues similar to those dealt with in academic dismissal questions. Two graduates of a medical school in the Dominican Republic were denied medical licenses by the New York Department of Education. A lower court granted the applications of the graduates individually to have the determinations annulled. On appeal, the court confirmed the determinations and dismissed the petitions.[293] The graduates' records did not demonstrate that they completed their medical education at a school which met the department's requirements, that they completed an integrated program of medical education as prescribed by the department, or that they completed clinical rotations as a part of an integrated, supervised program.

In a second case involving professional licensing, two petitioners with Ph.D. degrees in counselor education sought admission to the state's licensing examination in psychology. Their applications were denied by the state board of regents on the determination that they had not substantially met the requirements of a doctoral program in psychology. A lower court[294] dismissed an appeal request. On an appeal of the lower court decision, the court determined that the term "substantial equivalent" referred to the content of a program, not to the degree.[295] The court upheld the board, finding that the counselor education doctoral program was not designed as preparation for the professional practice of psychology.

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292. Rozas v. Department of Health and Human Resources, 522 So. 2d 1195 (La. Ct. App. 1988).

293. McDonagh v. Ambach, 528 N.Y.S.2d 730 (App. Div. 1988).

294. *See* The Yearbook of Education Law 1988 at 254, Fox v. Board of Regents of State of N.Y., 649 F. Supp. 1393 (N.D.N.Y. 1986).

295. Fox v. Board of Regents of State of N.Y., 527 N.Y.S.2d 651 (App. Div. 1988).

Other Constitutional Issues

Black and Hispanic alumni of a college which is a branch of a public university formed an alumni association dedicated to the concerns of minority students and alumni. The alumni alleged that the college administration selectively refused to grant recognition to the association, thereby violating their freedom of speech and equal protection rights. The court, vacating and remanding, found that the determination of racial discrimination demands sensitive inquiry and was necessary to determine whether the college's justification for its denial of official recognition was nondiscriminatory.[296]

A $217 controversy has stretched over seven years. The Puerto Rican Department of Consumer Affairs ordered an institution to reimburse tuition for cancellation of classes following a strike. The president and trustees of the university brought action for nullification of the order requiring the reimbursement to the student. The first circuit held that the department's decision requiring reimbursement to the student was insufficient to establish a first amendment claim under the freedom of educational process doctrine.[297]

The Immigration and Naturalization Service determined that a Korean, nonimmigrant exchange scholar, married to an American citizen, was required in compliance with the terms of the Fulbright program, to return to Korea for two years before permanent residence status could be received. The court held that the service abused its discretion by not waiving the requirement due to exceptional hardship suffered by an American citizen and granted summary judgment to the scholar and her husband.[298]

LIABILITY

Personal Injury

Personal injury litigation included cases involving death, bodily injury, libel, defamation, breach of professional-client relationship, and battery. Questions of liability surround each of these types of cases. In the case involving a death, an Illinois court found that damages based on lost salary calculated to reflect testimony that he would eventually have been dean of the college, could be awarded to a deceased professor's wife.[299] An airline was held responsible for the professor's wrongful

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296. Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Baruch College, 835 F 2d 980 (2d Cir. 1987).

297. Cuesnongle v. Ramos, 835 F 2d 1486 (1st Cir. 1987).

298. Younghee Na Huck v. Attorney General of United States, 676 F. Supp. 10 (D.D.C. 1987).

299. Lorenz v. Air Ill., Inc., 522 N.E.2d 1352 (Ill. App. Ct. 1988).

death. A hazing incident involving a student organization indirectly affiliated with a campus Air Force Reserve Officer Training Corps resulted in the wrongful death of a student and a suit by the parents of the deceased.[300] The court found that the organization was an unrecognized group containing R.O.T.C. students whose supervision was a discretionary function of the Air Force, barring suit for wrongful death. A federal district court denied summary judgment in a wrongful death emanating from a shooting in a residence hall.[301] The student and her roommate were both shot and killed by her roommate's suitor. The court found that material facts existed as to whether the university had reason to have foreseen the crime and breached its contract by failing to maintain proper security within the residence hall.

Bodily injury cases were also litigated and involved incidents which took place on the institution's property. A Kansas court found that an institution had immunity from injury resulting from recreational use of public property.[302] The court also ruled that the institution which failed to prohibit sledding, but installed warning signs and put padding around trees, was not liable for wanton and negligent behavior when it had a sign-out policy for cafeteria trays. In California, a court found that the school did not have a duty to adequately light and monitor the exterior of a building so as to prevent assaults for which a student had sustained injury.[303] An Ohio court found that a university was not liable for the injury sustained by the plaintiff who stepped off the sidewalk onto a dirt path on campus and fell.[304] An Indiana court found that the institution's duty to the plaintiff ceased when she stepped from the campus bus on to a grassy strip, and was subsequently hit by a car while attempting to cross the street behind the bus.[305] However, in another case on appeal, a court reversed the dismissal of a case by the lower court finding that the naming of the specific administrator responsible for maintaining the jogging path upon which the student was injured would not bar the hearing of the case.[306] A Missouri court found that an employee's remedy was workmen's compensation[307] for injury sustained on a parking lot, while a Nebraska court found that the institution created a hazardous condition in the piling of snow on a parking lot which resulted in ice, causing the plaintiff to slip, fall, and sustain injuries.[308]

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300. Del Valle v. United States, 856 F.2d 406 (1st Cir. 1988).
301. Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y. 1988).
302. Boaldin v. University of Kan., 747 P.2d 811 (Kan. 1987).
303. Donnell v. California W. School of Law, 246 Cal. Rptr. 199 (Ct. App. 1988).
304. Thompson v. Kent State Univ., 521 N.E.2d 526 (Ohio Ct. Cl. 1987).
305. Heger v. Trustees of Ind. Univ., 526 N.E.2d 1041 (Ind. Ct. App. 1988).
306. Daly v. University of Wis., Whitewater, 429 N.W.2d 83 (Wis. Ct. App. 1988).
307. Heskett v. Central Mo. State Univ., 745 S.W.2d 712 (Mo. Ct. App. 1987).
308. Russell v. Board of Regents of Univ. of Neb., 423 N.W.2d 126 (Neb. 1988).

Cases involving bodily injury in campus housing were also before the courts. An Oregon court found no institutional liability when a woman was injured when she stepped in a hole while trick-or-treating with her children.[309] In North Carolina, an appellate court reversed a judgment[310] finding that the replacement of the storm door screen with glass was not reasonably prudent given the circumstances that the tenet's son was known to push on that part of the door.[311] A Kansas university was held liable for injuries sustained when an individual fell in a stairwell where the lights were burnt out.[312] However, a court did not find the architect who designed the building in 1971 liable when, in 1982, a student tripped in a stairwell, fell through a screen, and sustained injuries in the three story fall.[313] The statute of limitations for this type of liability was ten years.

Liability for injuries sustained in the course of involvement in university sanctioned or sponsored events held off campus was also litigated. In Louisiana, members of a women's basketball team were involved in an accident in a van owned by a private individual and driven by a team member.[314] The court found that students on scholarships were not employees obligating the university to pay damages for injuries sustained by the other party involved in the accident. In Pennsylvania, the district court issued a summary judgment in favor of the university and its security division in an incident which culminated in the drowning of an individual.[315] While the drowning victim was stopped for a motor vehicle violation, he evaded university security officers by jumping into the river and later analysis found a blood alcohol level of .17. Another federal court issued a summary judgment to an institution when a volunteer was injured in a motor vehicle accident while being transported to the refugee camp from the living quarters by a private carrier.[316]

Bodily injury cases involved intentional tort claims. In Ohio, the court reheard a remanded decision[317] finding that the college lacrosse player who flipped an opponent during play was not liable for the injury sustained by the opponent.[318] In a case involving academic requirements, the court found that the eleventh amendment immunity barred the plaintiff's suit

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309. Bellikka v. Green, 746 P.2d 255 (Or. Ct. App. 1987).

310. See The Yearbook of Education Law 1988 at 264, Bolkhuv. North Carolina State Univ., 355 S.E.2d 780 (N.C. Ct. App. 1987).

311. Bolkhuv. North Carolina State Univ., 365 S.E.2d 898 (N.C. 1988).

312. Burch v. University of Kan., 756 P.2d 431 (Kan. 1988).

313. Leeper v. Hillier Group, Architects Planners, P.A., 543 A.2d 258 (R.I. 1988).

314. Nelson v. Bonquillo, 517 So. 2d 454 (La. Ct. App. 1987).

315. Lach v. Bobb, 679 F. Supp. 508 (W.D. Pa. 1988).

316. Chen v. Georgetown Univ., 685 F. Supp. 83 (S.D.N.Y. 1988).

317. See The Yearbook of School Law 1987 at 269, Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).

318. Hanson v. Kynast, 526 N.E.2d 327 (Ohio Ct. App. 1987).

alleging injury when he was required to read texts which contained profane language.[319]

Cases involving libel or slander were also before the courts. Control of an experimental device used in the treatment of cancer resulted in one university employee making slanderous statements against another employee.[320] The employee was successful in his slander claim. However, in a companion case, the court found that the insurance company was not liable for damages when one employee sues another.[321] In New York, the long arm statutes of the state could not reach the alleged defamatory statements about a New York coach's deed published in California by a California resident who conducted no business in New York, and whose daughter was an alumnus of the New York institution.[322]

In a case involving a person diagnosed as HIV positive, the plaintiff sustained a claim of a breach of the physician-patient privilege when the doctor asked and the patient agreed to having his picture silhouette taken, but was not informed that it would be published in the local newspaper in an article about AIDs research.[323] In another AIDs case, the court refused to grant a summary judgment to a university affiliated hospital.[324] The court found material issues existed as to whether the giving of transfusions, without parental consent, to a premature newborn who required them to fight a potentially fatal condition constituted battery.

A number of cases involved questions of immunity. When an Illinois worker was injured by equipment provided by an Indiana university, the court found that immunity questions were settled by Illinois law, and a suit for tortuous acts could be brought against the Indiana institution.[325] Two injury cases were dismissed because of eleventh amendment immunity of state universities.[326] In Mississippi, the court found that a football coach, athletic trainer, and a doctor at a public state university had qualified immunity against a suit for liable.[327] The suit arose from the death of a player who became ill during practice.

Workers' Compensation

Workers' compensation involved litigation on procedures, jurisdiction,

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319. Boles v. Gibbons, 694 F. Supp. 849 (M.D. Fla. 1988).
320. Raymond U v. Duke Univ., 371 S.E.2d 701 (N.C. Ct. App. 1988).
321. St. Paul Mercury Ins. Co. v. Duke Univ., 849 F.2d 133 (4th Cir. 1988).
322. Talbot v. Johnson Newspaper Corp., 527 N.Y.S.2d 729 (Ct. App. 1988).
323. Anderson v. Strong Memorial Hosp., 531 N.Y.S.2d 735 (Sup. Ct. 1988).
324. Kozup v. Georgetown Univ., 851 F.2d 437 (D.C. Cir. 1988).
325. Schoeberlein v. Purdue Univ., 521 N.E.2d 1215 (Ill. App. Ct. 1988).
326. Everhart v. University of Miss., 695 F. Supp. 883 (S.D. Miss. 1988); Houghton v. Board of Regents of Univ. of Wash., 691 F. Supp. 800 (S.D.N.Y. 1988).
327. Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988); *see* The Yearbook of School Law 1987 at 261, Sorey v. Kellett, 673 F. Supp. 817 (S.D. Miss. 1987).

eligibility, injury, and damages. On the question of jurisdiction, a Massachusetts' court ruled that the decision of a single member of the compensation board was final and that the employee's claim should be paid at the highest rate.[328] Another claim was dismissed because the statute of limitations (two years) had been exceeded between the injury and the filing of the claim.[329]

One case involved the eligibility of an employee. The court found that the university was liable for the death benefits awarded to the widow of a worker on loan from a contractor, but supervised by the university, when he was electrocuted while working on the campus.[330]

Several cases involved the cause of the disabling injury. A New York court dismissed the compensation claim of an employee injured while riding his bicycle to work.[331] However, another court found that the institution was liable in the injury of a dormitory employee working in an empty building.[332] The worker was assaulted by her former boyfriend who was assisted in locating her by co-workers. A Nebraska court dismissed a claim in which twenty months elapsed between the alleged injury and complaint to a doctor.[333]

Damage awards were also in dispute. A North Carolina court ruled that a state statute prohibited the relief of the employer's compensation responsibilities through a contract which offered full salary from other sources.[334] That state court also ruled that attorneys' fees could be awarded by the industrial commission as part of a claim.[335]

Contract Liability

Cases involving contract liability include issues of breach of contract, contract termination, and bidding for contracts. An Alabama case dealt with the question of a breach of warranty or fraud.[336] The case involved allegedly defective equipment leased from a finance company but supplied by another corporation. The court found that the lessor finance corporation could not be held liable for the breach of warranty and fraud charges brought against the supplier. In another case, a university hospital brought charges of a contract breach in an attempt to recover

328. Gordon's Case, 524 N.E.2d 1379 (Mass. App. Ct. 1988).
329. Taylor v. Vassar College, 530 N.Y.S.2d 289 (App. Div. 1988).
330. Virginia Polytechnic Inst. and State Univ. v. Frye, 371 S.E.2d 34 (Va. Ct. App. 1988).
331. Kapogiannis v. Vassar College, 530 N.Y.S.2d 293 (App. Div. 1988).
332. Raybol v. Louisiana State Univ., 520 So. 2d 724 (La. 1988).
333. Kuticka v. University of Neb.-Lincoln, 418 N.W.2d 593 (Neb. 1988).
334. Estes v. North Carolina State Univ., 365 S.E.2d 160 (N.C. Ct. App. 1988).
335. Karp v. University of N.C., 362 S.E.2d 825 (N.C. Ct. App. 1987).
336. Lawson State Community College v. First Continental Leasing Corp., 529 So. 2d 926 (Ala. 1988).

fees from the spouse of a patient given medical services.[337] The court found that abandonment of the spouse by the patient was a defense to the suit. In Missouri, a court found that the college had breached a contract with a health club when it failed to provide adequate space.[338] However, the case was remanded with instructions due to an error in the method of computing damages. In another case, the court affirmed a summary judgment to the manufacturer when the college waited six years to file a claim after discovering defective materials used in a new building.[339] In Michigan, the court found that the state's long arm statute would not reach an out of state corporation which did not conduct continuous business in the state.[340]

Termination of contracts were also litigated. In Alabama, the court found that the state board of adjustments would protect the due process rights of a linen company contract terminated by a public university.[341]

The terms of insurance contracts were litigated. In Pennsylvania, the court affirmed a summary judgment in favor of the insurer.[342] Failure of the institution to notify them of the suit by a disgruntled employee, to request defense provisions, and refusal of counsel figured into the court's decision. In another case, a similar result was reached when the institution failed to notify the insurer until after it had struck a settlement agreement with a governmental agency.[343] In South Dakota, the court found that a student group insurance policy covered the student's newborn because the insurance policy fit under the state law definition of a blanket insurance policy.[344]

Procedures surrounding bids for contracts were before the courts. In one case, a bidder's complaint was dismissed because the appeal procedures were yet to be completed when the suit was filed.[345] In another case, the court reversed and remanded a lower court decision because the institution had failed to publish on the notice of rejection the proscribed information concerning the procedures to appeal a rejected bid.[346] A New York court held that the City University of New York was not held to the municipal laws requiring the break up or fractionalizing

337. Yale Univ. School of Medicine v. Collier, 536 A.2d 588 (Conn. App. Ct. 1988).
338. Lowder v. Missouri Baptist College, 752 S.W.2d 425 (Mo. Ct. App. 1988).
339. Milwaukee Area Vocational Technical Dist. and Adult Educ. v. United States Steel Corp., 847 F.2d 435 (7th Cir. 1988).
340. Andrews Univ. v. Robert Bell Indus., Ltd., 685 F. Supp. 1015 (W.D. Mich. 1988).
341. Medical Laundry Serv., Inc. v. Board of Trustees of Univ. of Ala., 840 F.2d 840 (11th Cir. 1988).
342. Widener Univ. v. Fred S. James & Co., 537 A.2d 829 (Pa. Super. Ct. 1988).
343. Harrisburg Area Community College v. Pacific Employers Ins. Co., 682 F. Supp. 805 (M.D. Pa. 1988).
344. Cullum v. Mutual of Omaha Ins. Co., 840 F.2d 619 (8th Cir. 1988).
345. Bowers Office Prod., Inc. v. University of Alaska, 755 P.2d 1095 (Alaska 1988).
346. Capital Copy Inc. v. University of Fla., 526 So. 2d 988 (Fla. Dist. Ct. App. 1988).

of various tasks within the total project.[347] In an Illinois case, the court found that concealment of design defects, threats of subcontractor termination, and false backcharges were insufficient to reach a claim of racketeering activity.[348]

Deceptive Practices

Several cases involved claims that an institution had engaged in deceptive practices. In Ohio, the court ruled that a student had failed in her charge that the university had misrepresented a graduate degree when she discovered that she could not be certified to teach English at the end of the academic year.[349] The student failed to provide corroborating evidence that she had asked for and was promised a degree to teach English as opposed to speech communication which the school maintained she was working towards. Furthermore, the court found the student negligent in not reading the college catalogue which clearly outlined the degree requirements.

In another case, an employee alleged that the institution concealed from him his illness acquired through exposure on the job to beryllium dust.[350] A summary judgment in favor of the institution was affirmed based on the finding that no damage resulted from the alleged fraud and conspiracy.

Negligence

Cases involving negligence included an Alabama case of the wrongful death of a participant struck by a vehicle when crossing the road during a fraternity hay ride.[351] The state supreme court found that the organizer of the hay ride was not negligent even though alcohol was served to minors, the provider of the wagon for the hayride was not a "common carrier" implicating a higher duty of care, nor was the driver of the pickup which pulled the wagon guilty of wanton negligence when he stopped the vehicle on a level stretch of road to allow participants to relieve themselves. In another case, alcohol served at a local fraternity party to a minor who was then injured, resulted in a suit against the national fraternity. The court remanded the case with instructions that the issue was whether the national

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347. Michael Mazzeo Elec. Corp. v. Murphy, 522 N.Y.S.2d 798 (Sup. Ct. 1987).

348. Brandt v. Schal Assocs. Inc., 854 F.2d 948 (7th Cir. 1988); *see* The Yearbook of Education Law 1988 at 262. Brandt v. Schal, Inc., 664 F. Supp. 1193 (M.D. Ill. 1987).

349. Hershman v. University of Toledo, 519 N.E.2d 871 (Ohio Ct. Cl. 1987).

350. Kelman v. University of Chicago, 519 N.E.2d 708 (Ill. App. Ct. 1988).

351. Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan, 740 S.W.2d 127 (Ark. 1987).

fraternity intentionally rendered substantial assistance in serving alcohol to the minor.[352]

In Vermont, victims of a shooting by a university student previously involved in a similar incident brought negligence charges against the university where the student was enrolled.[353] The court granted summary judgment to the university finding no duty of care for the student's criminal act. In a case involving a university hospital resident, the court found that the resident had no duty to advise a surgeon concerning a warning of the dangers of surgery given by an outside specialist and communicated to the resident by the patient.[354]

Medical Malpractice

A number of cases were heard involving medical malpractice suits against university hospital physicians. The issues include cases involving a finding of negligence, the time period within which a claim can be brought, and questions of access to care review committee reports conducted by the hospital. In Alabama, the court denied a summary judgment finding issues to be resolved at trial in the physician's failure to order a cesarean section causing the newborn to be injured during birth.[355] In another case, the jury awarded over two million dollars in damages to the parents of an infant whose penis was burnt off during a circumcision procedure.[356] Damages were awarded where a university veterinary hospital wrapped a horse's tail too tightly and it had to be amputated.[357]

Several cases were dismissed because the statute of limitations had been exceeded in filing the claim.[358] In another case, the court ruled that members of a physicians care standards committee could be compelled to testify in a malpractice suit.[359] On appeal, the state supreme court found that there is no waiver of privilege which allows discovery of hospital peer review committee deliberations.[360]

Indemnification

In a case on appeal, the court held that the insurance company's

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352. Jefferis v. Commonwealth, 537 A.2d 355 (Pa. Super. Ct. 1988).
353. Smith v. Day, 538 A.2d 157 (Vt. 1987).
354. Cornell v. Ohio State Univ. Hosps., 521 N.E.2d 837 (Ohio Ct. Cl. 1987).
355. James v. Woolley, 523 So. 2d 110 (Ala. 1988).
356. Felice v. Valleylab, Inc., 520 So. 2d 920 (La. Ct. App. 1988).
357. Carter v. Louisiana State Univ., 520 So. 2d 383 (La. 1988).
358. Lenhard v. Butler, 745 S.W.2d 101 (Tex. Ct. App. 1988), Narins v. DeBrovner, 529 N.Y.S.2d 316 (App. Div. 1988), Roseman v. Hospital of Univ. of Pa., 547 A.2d 751 (Pa. Super. Ct. 1988).
359. Emory Univ. v. Houston, 364 S.E.2d 70 (Ga. Ct. App. 1987).
360. Emory Clinic v. Houston, 369 S.E.2d 913 (Ga. 1988).

policies expressly excluded claims involving the intentional denial of a former professor's constitutional rights.[361] The insurance company was not required to defend the institution in this suit.

ANTITRUST

In a case on appeal, the circuit court of appeals found that Rocky Mountain State University was not in violation of the Sherman Act[362] when they decided to allow only one spring retail show in their minidome, used a contract to determine the highest bidder, and awarded the highest bidder a five-year contract to provide the show.[363] The court found that the plaintiffs were unable to establish that the minidome was the only facility in the area to hold such a show.

Patents and Copyrights

In one patent case, the corporation waived its attorney-client privilege when it used its communication as a defense against willful and deliberate infringement.[364] The court found that it would be inequitable for the corporation and its attorney to be selective in which communication it provided. In a case involving a patent for DNA synthesis, the court found that a corporation had a reasonable apprehension of being sued to ask for a declaratory judgment on the validity of its patent when it received a letter challenging the patent.[365] In another case, a patient's cells were used to produce a pharmaceutical product of enormous therapeutic and commercial value.[366] Based on the doctrine of conversion, the patient had both decision-making and financial interest in the product developed from his tissue.

In a copyright suit over a photograph, the court found that the institution and the officer in her official capacity were protected by immunity from suit, but the director was not immune in her individual capacity.[367] In another case, a court found that a software developer did not infringe a copyright when it reproduced information in a new

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361. Brooklyn Law School v. Aetna Casualty and Sur. Co., 849 F.2d 788 (2d Cir. 1988); *see* The Yearbook of Education Law 1988 at 263, Brooklyn Law School v. Aetna Casualty and Sur. Co., 661 F. Supp. 445 (E.D.N.Y. 1987).

362. The Sherman Anti-trust Act, 15 U.S.C. §§ 1,2 (1978).

363. Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988); *see* The Yearbook of School Law 1987 at 275, Ferguson v. Greater Pocatello Chamber of Commerce, 647 F. Supp. 190 (D. Idaho 1985).

364. Trustees of Leland Stanford Jr. Univ. v. Coulter Corp., 118 F.R.D. 532 (S.D. Fla. 1987).

365. Millipore Corp. v. University Patents, Inc., 682 F. Supp. 227 (D. Del. 1987).

366. Moore v. Regents of Univ. of Cal., 249 Cal. Rptr. 494 (Ct. App. 1988).

367. Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988).

format from correlation tables of a copyrighted standardized test.[368] In another case, the court found that the state's voluntary involvement in copyright activity did not waive the eleventh amendment immunity protection and the Copyright Act[369] did not require the waiving of immunity protections by state agencies.[370]

Estates and Wills

A federal district court ruled that it had jurisdiction in a claim to assert the right to the proceeds of a trust even when the will was probated in state court.[371] In another case, the court ruled that to use for tax purposes the value of a residential home in assigning worth to a mansion located in a downtown area donated to the college was error.[372]

Several cases contested the validity of a will or trust. In Kentucky, a court ruled that the lower court abused its discretion in reforming a trust which on its face was void.[373] The testators had created a private trust which violated the rules against perpetuities. In a Wyoming case, nieces and nephews of the testator who turned his estate over to a college were unsuccessful in a challenge of the mental capacity of the testator at the time the will was executed.[374]

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368. Regents of Univ. of Minn. v. Applied Innovations, Inc., 685 F. Supp. 698 (D. Minn. 1987).

369. Copyright Act of 1979, 17 U.S.C. §§ 101-810 (1982).

370. BV Engineering v. University of Cal., Los Angeles, 858 F.2d 1394 (9th Cir. 1988).

371. Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

372. Estate of D. D. Palmer v. Commissioner, 839 F.2d 420 (8th Cir. 1988).

373. University of Louisville v. Isert, 742 S.W.2d 571 (Ky. Ct. App. 1987).

374. Estate of Roosa v. Northern Wy. Community College Found. of Sheridan, 753 P.2d 1028 (Wy. 1988).